SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 784

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY,
Appellants,

v.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON and FRANK J. MILLER, Commissioners constituting "RAILROAD COMMISSION OF OREGON," and A. M. CRAWFORD, Attorney General of the State of Oregon,
Appellees.

BRIEF FOR APPELLEES

Appeal from the Circuit Court of the United States for the District of Oregon

STATEMENT

At the outset it may be stated that this cause presents many of the same questions which are presented in Oregon Railroad & Navigation Company v. these defendants and appellees, *et al.*, No. 424, which is assigned for hearing at the same time with this case. The similarity in issues involves a necessary duplication of the line of argument in

certain particulars, if each case is to be pres
in independent briefs. There are, however,
important differences between this case and
Navigation Company case which will appear in
argument.

This case is an appeal from a decree of the Cir
Court of the United States for the District
Oregon, dismissing the bill of complaint of Sout
Pacific Company and Oregon & California Railro
Company v. Thomas K. Campbell, Clyde B. Aitch
son and Frank J. Miller, constituting "Railro
Commission of Oregon," and A. M. Crawfor
Attorney General of the state of Oregon.

The bill and amended bill challenged the cons
tutionality of the act of the Legislative Assemb
of the state of Oregon creating the Railroad Co
mission of Oregon, the powers granted the Co
mission under said act, and the validity of an or
of the Commission prescribing certain class ra
charged for the transportation of commodities the
under over the lines of appellants, Southern Pacif
Company and Oregon & California Railroad Co
pany, between Portland, Oregon, and other point
and places within the state of Oregon.

The Oregon & California Railroad Company, on
of the appellants, holds the legal title to and own
the lines of railway in question. All of its stoc
is owned by appellant Southern Pacific Company
and its lines of railway are operated by the latt
under a lease.

The lines of the Oregon & California Railro

Company lie wholly within the state of Oregon, but are operated as a part of the Southern Pacific system. The Oregon & California Railroad Company owns about 670 miles of main and branch lines of track within the state. The lines in question, over which freight moves, and to which the order of the Railroad Commission, which is attacked, applies, are as follows:

Main line—

Portland, Oregon, to the southern boundary of the state.

Branches—

Portland (Jefferson street) to St. Joseph, Oregon.

Portland (Park street) to Corvallis, Oregon, and seven other branches, which need not be enumerated.

This railroad has physical connections with other railway lines operated by the Southern Pacific at the Oregon-California boundary line; and also connections at Portland, Oregon, with the Union Pacific Railway system and other railway systems extending to other states. Intrastate and interstate commerce is carried on over said lines of railway by appellants.

The bill prayed a temporary restraining order pending the hearing and that upon final hearing a perpetual injunction be issued enjoining defendants from attempting to enforce the order, or to prosecute any suits, etc., and that the order be set aside, and that the Railroad Commission act be declared to be invalid, and for other relief therein set out.

General and special demurrers were interposed to the bill, which were sustained by the Court below and the decree dismissing the bill now appealed from, was rendered.

The Railroad Commission of Oregon was created by the act of the Legislative Assembly of the state of Oregon in the year 1907, (Rec. 4, par. V) known as Laws of 1907, chapter 53. A copy of the act as originally passed is set out as an exhibit on pages 111 to 160 of the Record in Oregon Railroad & Navigation Company v. these appellees, No. 424, which is assigned for hearing on the same day as this cause.

Under the provisions of this act an investigation on the Commission's own motion was made of the class rates in effect over and on the appellant Southern Pacific Company's main and branch lines between Portland, Oregon, and other points and places in said state. The rates investigated appear with others in the tariff of appellant effective October 9, 1909, No. 235-A, O. R. C. No. 434, with supplements amendatory thereof. (Rec. 6).

After due hearing and investigation, in which the appellant Southern Pacific Company appeared and participated, the Commission found certain of the class rates named in said tariff, over the lines of appellant within the state of Oregon, between Portland and other points and places in said state, unjust, unreasonable and excessive. The Commission also found said rates to be unjustly discriminatory as against the several stations and localities

enumerated in the order, and unjustly discriminatory as between the various classes of commodities taking class rates according to the western classification No. 48 (Rec. 16). In accordance with this determination, on September 21, 1910, it condemned certain of the existing rates, and by order duly made and entered fixed class rates which it determined to be just and reasonable and not discriminatory, to be charged thereafter for such transportation. The rates ordered were generally somewhat lower than those in effect, although, as will appear by an examination of the findings, many rates were not disturbed. The order was duly served and appellant given twenty days after the service thereof to comply therewith (Rec. 25).

Thereafter, on October 12, 1910, appellants filed the bill of complaint in the Court below, and a temporary restraining order was issued restraining said order from going into effect on the date fixed.

Appellees appeared as by order of the Court required to show cause why a preliminary injunction should not be granted and proof was submitted by both parties thereon. Appellees also filed a general and special demurrer to the bill. After a hearing before three judges as by law required a preliminary injunction was denied. On July 3, 1911, the court below sustained the demurrers and allowed appellants 30 days from the date thereof within which to file an amended bill of complaint (Rec. 53; 189 Fed. 182).

No amendment to the bill being filed, on the 18th day of July, 1911, counsel for appellants appeared

in open court and stated that appellants did not desire to plead further in said cause, whereupon an order was entered by the court sustaining said demurrers and dismissing the bill (Rec. 59).

On July 28, 1911, a petition for appeal to this court was filed (Rec. 60) and the appeal was allowed and perfected.

As this cause was heard and determined on bill and demurrers, a statement of the allegations of the bill in some detail is necessary to disclose the issues sought to be tendered.

ALLEGATIONS OF BILL OF COMPLAINT.

Paragraphs I to VI inclusive of the bill are the introductory portions, and set out the organization of the complainants, certain jurisdictional facts, the lines operated within Oregon, the creation of the Railroad Commission and the official positions of the defendants (Rec., pp. 2 to 5).

Paragraph VII sets out, *in haec verba*, section 57 of the Railroad Commission act and that on September 21, 1910, pursuant to an investigation upon its own initiative the Commission "pretending to observe and follow the said Railroad Commission Act" made the order complained of, which is then set out in full in the bill (Rec., pp. 5 to 25).

We set out so much of the order as we deem material for the purpose of this argument, calling attention, however, specifically to that portion we omit covering the rates condemned (Rec., pp. 7 to 15), and the rates established (Rec., pp. 17 to 24), as they consist of lengthy tabulations. (Italics our own; caption omitted).

THE ORDER ATTACKED.

"Now on this 21st day of September, 1910, the above entitled matter comes on before the Commission for final determination, due notice of hearing having been given said Southern Pacific Company and said Company having been furnished with a statement setting forth the rates investigated, and hearing having been duly had. And the Commission having considered the testimony and proofs taken and the argument of counsel, and being fully advised in the premises, finds:

"1. That the said Southern Pacific Company is a corporation organized under and existing by virtue of the laws of the state of Kentucky, and is a common carrier engaged in the transporation of persons and property by railroad between the following points in the state of Oregon, to-wit: [naming the main and branch lines]. That as such common carrier said Southern Pacific Company is subject to the provisions of chapter 53 of the Laws of Oregon for the year 1907 and acts amendatory thereof and supplemental thereto.

"2. That the said Southern Pacific Company maintains freight stations in the city of Portland known as Portland (Park Street), East Portland and Portland (Jefferson Street).

"3. That the said Southern Pacific Company imposes and charges for the *intrastate* transportation of freight in carloads and less than carloads, between Portland (Park St.), East Portland and Portland (Jefferson St.), Oregon, and other points upon its said lines of railroad within the state of Oregon, the several class rates hereinafter set forth which

govern the *intrastate transportation of freight* between such stations in Portland and said other stations hereinafter named taking class according to section 1 of said Southern Pacific Company's Local and Joint Freight Tariff No. 235-A, issued September 1, 1909, and effective October 9, 1909, O. R. C. No. 434, with its effective supplements. The classification of freight taking class rates is determined by the classification filed by said Southern Pacific Company with said Railroad Commission of Oregon known as The Western Classification No. 48, together with its supplements and reissues, and also by the exception to said Classification No. 48, being a reissue of the Western Classification No. 47 and its supplements described in the original statement herein. Said class rates are as follows: [Here follows table of rates condemned by the Commission].

"4. *That the above enumerated class rates are and each of them is unjust, unreasonable and excessive.*

Said Southern Pacific Company also makes and charges in a similar manner numerous other class rates which are fully set out in the said tariff No. 235-A, O. R. C. No. 434, with its effective supplements.

"5. *That the aforesaid class rates are not arranged upon any uniform or approximately uniform relationship as to each other, and that in consequence thereof the aforesaid rates are unjustly discriminatory as against the several stations and localities above enumerated, and are unjustly discriminatory as between the various classes of commodities taking class rates according to the said Western Classification No. 48.*

"6. That *just* and *reasonable* and *non-discriminatory charges* for said Southern Pacific Company to charge, collect and impose in the future in lieu of those hereinafter found to be unjust and unreasonable, are the following: [Here follows table of rates prescribed].

"IT IS THEREFORE ORDERED, CONSIDERED AND DETERMINED, that the said Southern Pacific Company shall cease and desist from charging, imposing and collecting for the *intrastate* transportation of freight taking class rates under the provisions of The Western Classification and under the exceptions to said Classification aforesaid, the several rates set out in paragraph 3 hereof, which rates are now charged, collected and imposed by said Southern Pacific Company, and in lieu thereof shall in future charge, collect and impose the several rates respectively set forth in paragraph 6 hereof, and shall make the necessary changes in its tariffs and file the same with the Commission on or before twenty days from the date of service of a copy of this order upon it.

Nothing in this order contained shall be construed to apply to interstate commerce being carried on by said Southern Pacific Company over any of the lines of railroad aforesaid."

Paragraph VIII of the bill contains a statement covering the jurisdictional facts as to the amount involved and the basis generally on which the injunction is prayed for (Rec. 25).

Paragraph IX sets forth facts showing how various railroad systems terminating or having connections that terminate in Portland, Oregon, name

rates over the lines of the Southern Pacific Company to points on its lines in Oregon, and alleges generally that rates to points on its lines in Oregon are made by a combination of the through rate to Portland plus its local rates from Portland to points of destination in Oregon. The paragraph also names a large number of tariffs making rates from other states over the Southern Pacific Company's lines to points in Oregon. It is also alleged that rates from water points in California to points in Oregon on its lines are generally the combination of the ocean competitive rate to Portland and the local class rates out of Portland to destination, as shown in tariffs filed with the Interstate Commerce Commission for interstate use. A number of illustrations are given of particular rates and combinations of rates and of the effect on a through rate if the changes made by the order of the Commission be allowed to go into effect, it being alleged by reason of the method of the rate making adopted by the complainants that the result of the change would materially affect and necessarily reduce interstate rates. It is alleged that these tariffs are filed with the Interstate Commerce Commission and are required to be observed by law. All of said tariffs are by reference made part of the bill and the court is asked to take judicial notice thereof (Rec., pp. 25 to 33).

Paragraph X sets out the capital stock and bonded indebtedness of Oregon & California Railroad Company and the amount still due the Southern Pacific

Company for advances made under its lease of said company's properties, and also set out certain of the terms of the lease.

It is also alleged that under existing tariffs the rates do not yield any net revenues from which any dividend can be paid upon the capital stock or any part thereof. The bill also refers to the deficits of the past years, and alleges that the complainants are entitled to earn enough to pay 6 per cent upon the floating indebtedness of the company, 5 per cent upon the bonded indebtedness, 7 per cent upon the preferred stock, and 6 per cent upon the common stock of the company.

The gross earnings and expenditures from the years 1902 to 1909, inclusive, are set forth; also the division of the operating revenues between inter- and intrastate business and the amount the company claims it will lose per annum under the order if the same be permitted to go into effect, $120,859.32 upon *intra*state business, and $156,-072.48 upon *inter*state business affected by the order, a total of $276,931.80. (That there is an admitted error in this amount is pointed out later in this argument).

It is alleged that the tariffs previously in effect afforded complainants "but slight compensation above the cost of service," and the order if enforced will deprive them of large annual revenues and compel them to give the use of their properties without reasonable or just compensation, and will deprive them of their properties without any reason-

able compensation, and will require them to increase other rates upon traffic not affected by the order, and particularly upon the products of the soil; and will require them to discriminate against such last named products to the great injury of complainants and of the public.

It is also alleged that the largest decreases in the class rates affect classes 4 and 5, which consist largely of staples, particularly groceries and hardware, and that the only benefit from said decrease would be to jobbers and dealers in these products, who are now making large and excessive profits (Rec., pp. 33 to 37).

Paragraph XI describes the railways of complainants in Oregon. From this it appears that for a portion of the way south of Portland they have and operate on both sides of the Willamette river two substantially competitive lines of railway, both of which compete with the Willamette river; that other railroads are building in the same territory, and that the country is difficult and expensive in which to operate and maintain railroads. It is alleged the less carload merchandise tonnage received at points on the lines of the Southern Pacific in Oregon for one year is 99,264 tons, yielding a revenue of $777,984, all of which will be directly affected by the order; and that there is approximately in one year's business 15,203 tons of carload commodities yielding a revenue of $210,888.82 that will also be affected by said order, or a total of 115,467 tons yielding a revenue of $1,088,872.82,

or about 39 per cent of the total tonnage and 74 per cent of the total revenues, the whole of which is upon freight received; that the total freight revenue for the year ended June 30, 1909, was $3,490,-042.58, of which $1,088,872.82 was revenue derived from freight received affected by the application of class rates, amounting to 30 per cent of the total freight revenue of the complainants. (Rec., pp. 37 (Rec., pp. 39 and 40).

Paragraph XII sets forth the fact that the Oregon & California Railroad Company was incorporated under the laws of the state of Oregon on March 16, 1870, and that under the Constitution of Oregon, and section 34 of the act of its Legislative Assembly, approved October 14, 1862, the Company has the power to collect and receive such tolls or freights for transportation of persons or property as it may prescribe, and that by virtue of its articles of incorporation and of the Constitution and of the law it has become vested with the right to collect and receive such tolls on freight as it may prescribe, and that the Southern Pacific Company by virtue of its lease succeeded to all the franchises and rights of the Oregon & California Railroad Company and has the same power; that the order in question impairs these vested rights and is in violation of the state and federal Constitutions. (Rec., pp. 39 and 40).

Paragraph XIII alleges that no adequate or proper remedy has been given or provided for the protection of complainants against the unjust or

unlawful enforcement of the order in question, and sets out section 51 of the Railroad Commission act, and section 33 thereof as amended February 23, 1909, and alleges the lack of remedy to protect their property; that they are subject to excessive penalties and are denied the equal protection of the law. This paragraph also sets out section 1 of article III of the Constitution of Oregon, providing for the division of the powers of the government into the three departments and sets forth various ways in which it is alleged this section of the Constitution is violated by the Commission act. (Rec., pp. 40 to 42).

Paragraph XIV alleges that the defendants are threatening to institute proceedings against complainants and to compel enforcement of the order, and if not enjoined complainants will be compelled to observe and put into effect the rates prescribed or have their property confiscated to the use of the public in excess of about $300,000 per annum, and will be required to put in rates affecting interstate traffic contrary to the federal Act to Regulate Commerce, and that penalties and fines will be imposed to such an extent as to confiscate complainants' property to their great loss, etc. (Rec., pp. 42 and 43).

Paragraph XV sets forth the various conclusions of law drawn by the pleader upon which the court is asked to declare the Railroad Commission act and the order null and void, which summarized are as follows:

A. Complainants' property will be taken for private use without just or any compensation and without their consent, in violation of section 18, article I, of the Constitution of Oregon, and the enforcement of the order will not enable complainants to receive a just and fair return upon their property.

B-C. The act attempts to confer executive, legislative and judicial powers upon the Railroad Commission of Oregon, and the Commission in the proceedings before it exercised judicial functions, and in making the order, exercised legislative and judicial functions, in violation of section 1, article III of the Constitution of Oregon.

D. The act violates section 21, article I of the Constitution of Oregon, which provides that "No *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed the taking effect of which shall be made to depend upon any authority except as provided in this Constitution," etc.

E. The act also violates said section in that it provides the Railroad Commission shall exercise authority, which when exercised shall take effect upon its own orders, and not by virtue of any law passed by the Legislative Assembly.

F. The act violates section 1 of article VII of the Constitution of Oregon in that it provides that all proceedings involving orders of the Commission must be brought in the Circuit Court of the State of Oregon for Marion County, and it also violates

the Federal Constitution in that by reason of said provision complainants are denied the equal protection of the laws and are deprived of the right to litigate their cause of suit in the courts of the United States; and that it deprives complainants of their property without due process of law.

G. The act violates section 8, paragraph 3, article I, of the Constitution of the United States in that it attempts to confer upon the Railroad Commission of Oregon jurisdiction over interstate commerce.

H. The order violates section 8, paragraphs 3 and 18, article I, of the Constitution of the United States, and is in conflict with the act of February 4, 1887, entitled "An act to regulate commerce," and amendments thereto, in that it directly, materially and substantially affects rates upon interstate shipments.

I. The act is repugnant to section 10, article I, of the Constitution of the United States, in that it is violative of the contract rights of the complainants under the articles of incorporation of the Oregon & California Railroad Company, and its predecessors in interest, inasmuch as it was provided by section 34 of the act of the Legislative Assembly, approved October 14, 1862, that every corporation formed under the act for the construction of a railroad as to such roads "shall be deemed common carriers and shall have power to collect and receive such tolls or profit for transportation of persons or property thereon as it may prescribe."

J. The order is void because the reduction of the class rates in question is based upon an arbitrary approval of class 1 now in effect, and upon an arbitrary spread between the classes, which classification and spread were adopted arbitrarily and without a reference to the distance such traffic should be moved by the carrier or to the nature or character of the traffic or to the service to be performed or to the compensation that should be paid therefor, and will make the largest reduction effective at points where operation is most expensive and difficult.

K. The order is void in this, that rates prescribed by said order in lieu of existing rates are confiscatory of the property of complainants and will deprive complainants of their property without compensation and without due process of law. (Rec., pp. 43 to 47).

Paragraph XVI contains the prayer of the bill, that the Railroad Commission act, and the order made by the Commission, be set aside, and that defendants be restrained permanently from enforcing any of the provisions either of the act or of the order against complainants. (Rec., pp. 47 and 48).

The Oregon Railroad Commission Act, as in effect when suit was brought, is made a part of the bill by reference, and appellants pray that it and the amendments thereto may be taken as part of the bill as though fully embodied therein. The act, however, is not printed in the record. To save the court time and trouble, certain salient portions thereof are set out in this brief.

As the Supreme Court of Oregon has held the act to be not in violation of the State Constitution, we set out only the controlling provisions thereof as far as they may pertain to this controversy.

SYNOPSIS OF OREGON RAILROAD COMMISSION ACT.

COMMISSION CREATED.

It creates a Railroad Commission, composed of three persons elected by the people. Section 1. Lord's Oregon Laws, Sec. 6785.

NAME OF COMMISSION, ETC.

The commissioners shall be known collectively as "Railroad Commission of Oregon," and in that name may sue and be sued, etc. Section 7. L. O. L. Sec. 6681.

WHAT EMBRACED IN TERM "RAILROAD"—WHAT TRANSPORTATION GOVERNED BY ACT.

"The term railroad, as used herein, shall mean and embrace all corporations, companies, * * * that now, or may hereafter, own, operate by steam, electric or other motive power, manage or control, any railroad or interurban railroad, or part of a railroad or interurban railroad as a common carrier in this state, or cars or other equipment used thereon, or bridges, terminals, or side tracks, used in connection therewith, whether owned or operated under a contract, agreement or lease or otherwise. * * * The provisions of this act shall apply to the transportation of passengers and property, and to all railroad companies, etc., that shall do business as common carriers upon or over any line of railroad within this state." Section 11. L. O. L. Sec. 6686.

REASONABLY ADEQUATE SERVICE, ETC., EXACTED—CHARGES TO BE REASONABLE AND JUST.

Every railroad is required to furnish reasonably adequate service, equipment and facilities, and the charges made for any service rendered or to be rendered in the transportation of passengers or property or for any service in connection therewith, * * * shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. Section 12. L. O. L. Sec. 6887.

SCHEDULE OF RATES AND JOINT RATES TO BE PRINTED AND KEPT ON FILE.

Every railroad is required to print and file with the Commission a schedule of its rates and joint rates existing between all points in this state upon its lines, or any line controlled or operated by it. Section 13. L. O. L. Sec. 6888.

CHANGES IN SCHEDULE ONLY ON NOTICE—FILING NEW COPIES PRIOR TO CHANGE.

Changes in schedules are to be made only upon notice and filing of copies of new schedules with the Commission. Section 14. L. O. L. Sec. 6889.

UNLAWFUL TO TAKE OTHER COMPENSATION, ETC., THAN SPECIFIED IN SCHEDULES.

"It shall be unlawful for any railroad to charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property or for any service in connection therewith than is specified in such

printed schedules, including schedules of joint rates, as may at the time be in force, and the rates, fares and charges named therein shall be the lawful rates, fares and charges until the same are changed as herein provided." Section 16. L. O. L. Sec. 6891.

BUT ONE UNIFORM CLASSIFICATION OF FREIGHT.

"There shall be but one classification of freight in the state, which shall be uniform on all railroads." Section 20. L. O. L. Sec. 6895.

MANNER OF INVESTIGATION OF COMPLAINTS—INVESTIGATION ON COMMISSION'S OWN MOTION —POWER TO ORDER CHANGES.

"Upon complaint of any person, * * * that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are in any respect unreasonable or unjustly discriminatory, * * * the Commission may notify the railroad complained of that complaint has been made, and ten days after such notice has been given, the Commission may proceed to investigate the same as hereinafter provided. Before proceeding to make such investigation the commission shall give the railroad and the complainant ten days' notice of the time and place and when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. If upon such investi-

gation the rate or rates, fares, charges or classifications, or any joint rate or rates, or any regulation, practice or service complained of shall be found to be unreasonable or unjustly discriminatory, * * * the Commission shall have power to fix and order substituted therefor such rate or rates, fares, charges or classifications as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future. * * *

"No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

"*Whenever the Commission shall believe that any rate or charges may be unreasonable or unjustly discriminatory, or that any service is inadequate, and that an investigation relating thereto should be made, it may on its own motion investigate the same.* If, after making such investigation, the commission becomes satisfied that sufficient grounds exist to warrant a hearing ordered to determine whether the rate so investigated [is] unreasonable or unjustly discriminatory, * * * it shall furnish the railroad or railroads interested a statement setting forth the rate or service investigated, which said statement shall be accompanied by a notice fixing a time and place for hearing on such rate or service, as the case may be. Notice may likewise be given to other parties in interest, and shall be given at least ten days in advance of any hearing, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint was filed with the Commission relative to the matter investigated, pur-

suant to the provisions of this section, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint.

"This section shall be construed to permit any railroad to make complaint with like effect as though made by any person, firm, corporation or association, mercantile, agricultural or manufacturing society, body politic or municipal organization. * * *" Section 28. L. O. L. Sec. 6906.

SUBSTITUTIONS AND ENFORCEMENT OF RATES, CHARGES, CLASSIFICATIONS, ETC.

"Whenever, upon an investigation made under the provisions of this act, the Commission shall find any existing rate or rates, fares, charges or classifications, or any joint rate or rates, or any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, *are unreasonable or unjustly discriminatory*, or any service is inadequate, it shall determine and by order fix a *reasonable rate*, fare, charge, *classification*, or joint rate to be imposed, observed, and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory, or inadequate, as the case may be, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the railroad affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof. All railroads to which the order applies shall make such changes in their schedule on file as may be necessary to make the same

conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares, or charges, or in any joint rate, or rates, without the approval of the Commission. * * *

"The Commission may, at any time, upon notice to the railroad, and after opportunity to be heard as provided in section 28, rescind, alter or amend any order fixing any rate or rates, fares, charges, or classification, or any other order made by the Commission, and certified copies of the same shall be served and take effect as herein provided for original orders." Section 30. L. O. L. Sec. 6908.

COMMISSION'S ORDERS IN FORCE AND PRIMA FACIE REASONABLE UNTIL JUDICIALLY FOUND OTHERWISE.

"All rates, fares, charges, classifications and joint rates fixed by the Commission shall be in force and shall be *prima facie* lawful, and all regulations, practices, and service prescribed by the Commission shall be in force and shall be *prima facie* reasonable, until finally found otherwise in an action brought for that purpose pursuant to the provisions of sections 32, 33, 34 and 35 of this act." Section 31. L. O. L. Sec. 6909.

PROCEEDINGS ON SUITS AGAINST SUBSTITUTED RATES.

"Any railroad * * * interested in or affected by any order of the Commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or service, being dissatisfied therewith, may commence a suit in the

Circuit Court of Marion County against the Commission as defendant to vacate and set aside any such order on the ground that the rate or rates * * * fixed in such order, are unlawful, or that any such regulation, practice or service prescribed or fixed in such order is unreasonable. * * * The commission shall serve and file its answer to said complaint within ten days after the service thereof, whereupon said suit shall be at issue and stand ready for trial upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in said court, and the Circuit Court shall always be deemed open for the trial thereof, and the same shall be tried and determined as a suit in equity.

"In all trials under this section, and sections 33, 34 and 35 thereof, the burden of proof [shall] be upon the plaintiff to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful, or unreasonable, as the case may be." Section 32. L. O. L. Sec. 6910.

INJUNCTION NOT TO ISSUE AGAINST COMMISSION'S ORDER EXCEPT ON APPLICATION, NOTICE AND HEARING—TERMS OF BOND.

"After the commencement of such suit the Circuit Court may for cause shown, upon application to the Circuit Court or presiding judge thereof, and upon notice to the commission and hearing, suspend or stay the operation of the order of the Commission complained of until the final disposition of such suit, upon the giving of such bond or other security, and upon

such conditions as the court may require; and if such order of injunction suspends the order or requirement of the Commission fixing rates, then the court shall require a bond with a good and sufficient surety, conditioned that the railroad or railroads applying for such injunction shall answer for all damages caused by the delay in the enforcement of the order of the Commission and all compensation for whatever sums for transportation any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the Commission had not been suspended; and such bond shall cover the periods transpiring from time of the issuance of any such injunction until the final determination of the question litigated. The said bond shall be executed in favor of the Railroad Commission of Oregon for the benefit of whom it may concern, and shall be enforceable by said Commission or any person interested, in an appropriate proceeding. Any person paying charges found to be excessive, shall have a claim for the excess whether paid under protest or not, and unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such railroad, or such railroad and the sureties on such bond. Claims of persons for money collected in excess of the amount payable under the rate or rates established by the Commission shall be assignable in the same manner as any chose in action. No appeal to the Supreme deemed guilty of a misdemeanor, and upon Court shall stay the operation of any order of the Commission unless the Circuit or Supreme

Court shall so direct, and unless the railroad so appealing shall give a bond with like conditions and terms as that given on granting injunctions suspending an order of the Commission fixing rates." Section 33 as amended by Gen. Sess. Laws Or. 1909, p. 163. L. O. L. Sec. 6911.

RESUBMISSION TO COMMISSION WHEN EVIDENCE ON TRIAL DIFFERENT THAN BEFORE COMMISSION.

"If, upon the trial of such suit, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the Commission or additional thereto, the court before proceeding to render judgment, unless the parties to such suit stipulate in writing to the contrary, shall transmit a copy of such evidence to the Commission and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classification, joint rate or rates, regulation, practice, service or equipment complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

"If the Commission shall rescind its order complained of, the suit shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment or decree shall be rendered thereon, as though made by the Commission in the first instance. If the original order shall not

be rescinded or changed by the Commission, judgment shall be rendered upon such original order." Section 34. L. O. L. Sec. 6912.

APPEAL TO SUPREME COURT.

"Either party to said suit, within sixty days after the entry of the judgment or decree of the Circuit Court, may appeal to the Supreme Court. Where an appeal is taken the cause shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar, but shall have precedence over civil cases of a different nature pending in said court." Section 35. L. O. L. Sec. 6913.

INVESTIGATION OF INTERSTATE RATES—PROCEEDINGS BEFORE INTERSTATE COMMERCE COMMISSION.

"The Commission shall have power, and it is hereby made its duty to investigate all freight rates on interstate traffic on railroads in this state, and when the same are, in the opinion of the Commission, excessive or discriminatory or are levied or laid in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the Interstate Commerce Commission, the Comission shall present the facts to the railroad, with a request to make such changes as the Commission may advise, and if such changes are not made within a reasonable time the Commission shall apply by petition to the Interstate Commerce Commission for relief. All freight tariffs issued by any such railroad relating to interstate traffic in this state shall be filed in the

office of the Commission within thirty days after the passage and publication of this act and all such tariffs thereafter issued shall be filed with the Commission when issued." Section 47. L. O. L. Sec. 6925.

TREBLE DAMAGES TO INJURED PERSONS—ATTORNEY'S FEES.

"If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such railroad shall be liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case; provided, that any recovery as in this section provided, shall in no manner affect a recovery by the state of the penalty prescribed for such violation. * * *" Section 51. L. O. L. Sec. 6934.

PENALTY FOR VIOLATION BY OFFICERS, AGENTS OR EMPLOYEES.

"Any officer, agent or employe of any railroad who shall fail or willfully refuse to fill out and return any blanks as required by this act, or shall fail or refuse to answer any questions therein propounded, or shall knowingly or willfully give a false answer to any such question, or shall evade the answer to any such question, where the fact inquired of is within

his knowledge, or who shall, upon proper demand, fail or willfully refuse to exhibit to the Commission or any Commissioner, or any person authorized to examine the same, any book, paper or account of such railroad, which is in his possession or under his control, shall be conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each such offense; and a penalty of not less than five hundred dollars nor more than one thousand dollars, shall be recovered from the railroad for each such offense when such officer, agent or employee acted in obedience to the direction, instruction or request of such railroad or any general officer thereof." Section 52, L. O. L. Sec. 6935.

GENERAL PROVISION FOR PENALTY FOR VIOLATION BY RAILROADS.

"If any railroad shall violate any provisior of this act, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it, for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement, order made by the Commission, or any judgment or decree made by any court upon its application, for every such violation, failure or refusal, such railroad shall forfeit and pay into the state treasury a sum of not less than one hundred dollars, nor more than ten thousand dollars, for such offense. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any railroad, acting within the scope of his em-

ployment, shall in every case be deemed to be the act, omission or failure of such railroad.

"All penalties, fines or forfeitures, or other sums collected or paid under the provisions of this act, shall be paid into the general fund of the state treasury, except where it is provided the same shall be paid to the aggrieved party." Section 53. L. O. L. Sec. 6936.

EMERGENCY RATES PERMITTED ON ORDER OF COMMISSION.

"The Commission shall have power when deemed by it necessary to prevent injury to the business or interests of the people or railroads of this state in consequence of interstate rate wars, or in case of any other emergency to be judged of by the Commission to temporarily alter, amend, or with the consent of the railroad company concerned, suspend any existing passenger rates, freight rates, schedules, and orders of any railroad or part of railroad in this state. Such rates so made by the Commission shall apply on one or more of the railroads in this state or any portion thereof as may be directed by the Commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the Commission." Section 54. L. O. L. Sec. 6937.

RATES, CHARGES AND PRACTICES NOT SPECIFICALLY DESIGNATED MAY BE PRESCRIBED.

"Whenever, after hearing and investigation as provided by this act, the Commission shall find that any charge, regulation, or practice affecting the transportation of passengers or property, or any service in connection therewith, not hereinbefore specifically designated,

is *unreasonable* or *unjustly discriminatory*, it shall have the power to regulate the same as provided in sections 28 and 30 of this act." Section 55. L. O. L. Sec. 6938.

INQUIRY INTO VIOLATIONS OF RAILROAD LAWS, ETC.

"The Commission shall inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein, or by the officers, agents, or employees thereof, or by any person operating a railroad, and shall have the power, and it shall be its duty, to enforce the provisions of this act as well as all other laws relating to railroads and report all violations thereof to the Attorney General; upon the request of the Commission it shall be the duty of the Attorney General or the prosecuting attorney of the proper county to aid in any investigation, hearing, or trial had under the provisions of this act, and to institute and prosecute all necessary actions or proceedings for the enforcement of this act or the recovery of penalties payable to the state, and of all other laws of this state relating to railroads, and for the punishment of all violations thereof. Any forfeiture or penalty herein provided shall be recovered by an action brought thereon in the name of the State of Oregon in any court of appropriate jurisdiction. * * *" Section 57. L. O. L. Sec. 6940.

ACTION OF COMMISSION TO BE VALID NOTWITHSTANDING TECHNICAL IRREGULARITY—LIBERAL CONSTRUCTION OF ACT.

"A substantial compliance with the requirements of this act shall be sufficient to give effect to all the rules, orders, acts and regulations

of the Commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. The provisions of this act shall be liberally construed with a view to the public welfare, efficient transportation facilities, and substantial justice between shippers and passengers and railroads." Section 59. L. O. L. Sec. 6942.

RIGHTS OF ACTION NOT WAIVED BY THIS ACT.

"This act shall not have the effect to release or waive any right of action by the state or by any person for any right, penalty or forfeiture which may have arisen or which may hereafter arise under any law of this state; and all penalties and forfeiture accruing under this act shall be cumulative and a suit for, and recovery of, one shall not be a bar to the recovery of any other penalty." Section 60. L. O. L. Sec. 6943.

PREFERENCES AS TO LOCALITIES PROHIBITED.

"If any railroad, as the same is defined in section 6886 (L. O. L.), shall make or give an undue or unreasonable preference or advantage to any particular locality, or shall subject any particular locality to any undue, unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful; provided, this section shall not prohibit any railroad from giving necessary preference to live stock and perishable freight over other freight." L. 1909, c. 97, p. 158, Sec. 1; L. O. L. Sec. 6928).

COMMISSION TO REGULATE DISCRIMINATORY CHARGE OR PRACTICE.

> "Whenever, after hearing and investigation as provided by sections 6906, 6907 and 6908 (Lord's Oregon Laws) the Railroad Commission of Oregon shall find that any charge, regulation or practice affecting the transportation of passengers or property or any service in connection therewith is unjustly discriminatory against any locality, it shall have the power to regulate same as provided in said sections 6906, 6907 and 6908." (L. 1909, c. 97, p. 158, Sec. 2; L. O. L. Sec. 6929).

The various tariffs, which by reference are made a part of the complaint, do not appear in the record, but they are referred to on argument.

It will be observed there is no positive allegation of confiscation, nor are any facts alleged upon which confiscation could be predicted. All allegations of this character are qualified. Nor was there any test as to the actual workings of the rates or the effect of the order on the business or earnings of the appellants in advance of the filing of the bill.

DEMURRERS TO THE BILL.

To this bill of complaint defendants interposed demurrers (Rec. 49 to 53). The general demurrer was in the usual form and was based upon the following grounds:

> 1. "That it appears upon the face of the bill herein that the court has no jurisdiction of the subject-matter of the controversy between the parties.
>
> 2. "That it appears by the complainant's [complainants'] own showing by the said bill,

that it is [they are] not entitled to the relief prayed by the said bill against these defendants, or any of the defendants.

3. "That said complainant has [complainants have] not in and by its [their] said bill stated such a case as doth or ought to entitle it [them] to the relief, thereby sought and prayed for, from or against these defendants, or any of them.

4. "That it appears upon the face of the bill that the complainant has [complainants have] an adequate remedy at law."

Separate demurrers are directed to the following paragraphs of the bill: Paragraphs VIII and IX are demurred to on the following grounds:

1. "That it appears from the facts set forth in said paragraphs, and in each and all of them, that complainants are not entitled to the relief, or any part thereof, prayed for from or against these defendants, or any of them.

2. "That the facts as set out in said paragraph, and each of them, do not state a cause of suit, or any part of a cause of suit against these defendants, or any of said defendants."

A similar special demurrer was interposed to paragraphs X to XVI, both inclusive.

The demurrer was sustained and the motion of complainants for a preliminary injunction was denied. Complainants not desiring to plead further, the bill of complaint was dismissed (Rec., p. 59). Thereafter complainants appealed (Rec., p. 60).

The assignments of error are set out in the record, pages 61 to 64.

THE RECORD.

The printed record does not contain the law attacked, any tariffs or other documents referred to in the complaint, or any of the proceedings, orders, papers or exhibits filed on the hearings, save the complaint, demurrers, opinion of the court below, petition for appeal, etc.

As has been stated, the Railroad Commission Act of Oregon is attacked as being in contravention of the State Constitution. The order of the Commission is attacked on sundry grounds, which will be specifically referred to hereafter.

It is well, therefore, at the outset to have clearly in mind certain facts appearing on the face of the record.

1. There is no claim made of any jurisdictional defect in the proceedings before the Railroad Commission; it is not urged that appellants did not have notice or were not heard, or that full investigation was not made. Indeed, the bill of complaint in effect admits the Commission followed the provisions of the act. (Rec., p. 5, par. VII).

2. The Commission found that appellant Southern Pacific Company was violating the law in two particulars:

A. Imposing and charging for the transportation of intrastate traffic unjust, unreasonable and excessive rates.

B. Charging and exacting unjustly discriminatory rates as against places and localities and as between commodities.

Each of these acts is specifically condemned by law and it is the duty of the Commission to correct them when found to exist.

3. As required by law, the Commission, after notice, hearing and investigation, found and fixed just, reasonable and non-discriminatory charges to be charged in the future for those found unjust, unreasonable and unjustly discriminatory.

4. By the terms of the order itself, its operation was confined strictly to intrastate traffic and provided that nothing in the order should be construed to apply to interstate commerce being carried over any of the lines of the railroads involved.

So far as the order is concerned, therefore, there were two equally potent factors moving the Commission to action, the *unreasonableness* of the rates, and the *discriminations* being practiced.

QUESTIONS PRESENTED BY COMPLAINT.

A clear statement of the questions sought to be presented by appellants is set out in the opinion of the court below. It is as follows:

> "First—The act of the legislature creating the Railroad Commission is unconstitutional and void, because (a) of the excessive penalties and burdens imposed for refusal to obey the orders of the Commission; (b) because its provisions are not uniform and equal in their application; (c) because it confers upon the Commission legislative, executive and judicial powers; (d) because rate making is a legislative function and a rate cannot be made to take effect upon the order of a subordinate commis-

sion; (e) because it requires a railroad company aggrieved by an order of the Commission to prosecute any suit to review the same in the state courts; (f) because it provides for a judicial review of the orders of the Commission.

Second—The order in question is violative of the Constitution of the United States because it directly and materially affects interstate commerce, since the rate on interstate traffic over complainants' lines in Oregon is made up by the through rate to Portland with the local rate out.

Third—The law under which the Oregon & California Railroad Company was incorporated provides that a corporation organized thereunder "shall have power to collect and receive such tolls and freights for transportation of persons and property as it may prescribe," and thus deprives the state of the power to fix rates for transportation of freight or passengers.

Fourth—The rates fixed by the Commission and sought to be enjoined in this suit are so unreasonably low as to amount to confiscation *pro tanto* of complainants' property.

Fifth—The order of the Commission was based upon an arbitrary approval of class 1 of rates then in force on complainants' line and an arbitrary spread between such class and other classes without any reference to the distance the traffic was to be carried, the character or nature of the service to be performed, or the compensation that should be paid therefor.

Seventh [Sixth]—That the rates prescribed by the Commission are unreasonable, and this court should review the same under the provisions of the Commission act." (Rec., p. 54).

An examination of the complaint will, it is believed, justify the statement that the real underlying basis of the suit, is the question now before this court for review from a number of circuits—the alleged interference with interstate commerce by state railroad commissions in establishing reasonable intrastate rates.

This statement is made because from a comparison of the rates fixed by the order with those in effect prior thereto it is apparent no radical changes were made, and the allegations of the bill coupled with the estimates of loss in revenue and statements filed with the circuit court absolutely negative anything that even squints at confiscation, and the points of law relied on it is believed have been definitely settled by this court and the supreme court of Oregon.

One notable fact appears to which the court's attention at this stage should be directed, and which does not appear in other cases of a similar nature before this court, towit: the finding as to unjust discrimination. This finding is not met by the bill. No allegation attempts to negative it, and this breach of the law is even more abhorrent than the mere unreasonableness of a rate.

The real gravamen of the bill is that on account of the use of local rates by appellants in making interstate rates a reduction in the local rate works a like reduction in the interstate rate and hence is an interference with interstate commerce.

Certain of the questions will be determined by the court under the law; others as presented are mixed

questions of law and fact, and others presumptively deal with questions of fact. Whether the bill of complaint states facts necessary to maintain the issues attempted to be presented, or presents any real issues of fact, will be determined by an examination of the bill.

APPELLEES' CONTENTION.

Briefly stated, the contention of appellees, as representing the state of Oregon, is substantially as follows:

A. The power of the state in all matters affecting intrastate commerce is supreme, subject only to constitutional guaranties for the protection of property rights.

B. The state may pursue any desirable constitutional methods to effectuate this control. It may establish rates and regulations to be charged and enforced by common carriers in connection with intrastate traffic by the direct action of the legislature or through an administrative body.

C. The act of the legislative assembly creating the railroad commission of Oregon is, and the powers thereby granted are, constitutional.

D. The findings and conclusion of the commission in determining and fixing a reasonable rate to be charged in the future for the transportation of freight and condemning discriminations are not subject to review by the courts, except upon constitutional grounds.

E. In passing upon an order of the Commission fixing reasonable rates for the future or condemn-

ing unjust discriminations, a court will not substitute its judgment for that of the Commission as to the reasonableness of the rate in the ordinary meaning of the word, but passes on the question whether the rates fixed are unreasonable from a constitutional standpoint, i. e., confiscatory. When the Commission acts within the scope of its authority, the court will not review its acts or set aside its conclusion as to discriminatory acts and practices.

F. Appellants should pursue their remedy in the state courts before resorting to the injunctive process of the federal courts.

G. All presumptions are in favor of an order made by a duly authorized administrative tribunal.

H. No issuable fact is presented by mere general allegations as to the probable effect of the order, nor does a demurrer admit the truth of such allegations. To tender issues of fact a complaint must contain full, accurate, clear and distinct statements of ultimate facts.

I. The interference with interstate commerce that is to be condemned is a direct interference.

J. The statute and order regulate and attempt to regulate *intra*state commerce only and do not unduly or unlawfully interfere with *inter*state commerce.

K. The alleged contract right of appellants to fix rates is subject to the police power of the state.

L. Irrespective of the reasonableness of the rates, the unchallenged finding that the rates are unjustly discriminatory is sufficient to support the order.

POINTS OF LAW—AUTHORITIES AND ARGUMENT

THE RAILROAD COMMISSION ACT NOT IN CONFLICT WITH THE CONSTITUTION OF THE STATE OF OREGON.

It will be noted that a number of the grounds of error in Assignment V (Rec. p. 61) attack the railroad commission act as being in conflict with the constitution of Oregon. They are subdivisions (b), (c), (d), (e), (f), (i).

This question is no longer open, as the constitutionality of the act in question has been directly sustained by the supreme court of Oregon since the appeal was taken in the case at bar.

State v. Corvallis & Eastern R. Co., — Or. —, 117 Pac. 980.

This was an appeal from a judgment imposing a penalty for failure to comply with an order of the railroad commission for the erection of a depot and the installation of an agent. Defendant demurred, on the ground that the railroad commission Act unconstitutionally intermingled the several powers of the government. The supreme court of Oregon held the Act did not contravene the provisions of Article III, Sec. 1, of the Oregon constitution.

Such a construction of the state constitution and statute is binding upon this court. It is a matter of purely state concern, which, when decided by

the state supreme court, renders further consideration by this court unnecessary.

Chicago v. Sturges, 32 Sup. Ct. 92.
Missouri Pac. R. Co. v. Kansas, ex rel. Taylor, 216 U. S. 262.
Jack v. Kansas, 199 U. S. 372, 379.
Smiley v. Kansas, 196 U. S. 447, 454-5.
Merchants' Bank v. Pennsylvania, 167 U. S. 461, 462.
Encyc. of U. S. Sup. Ct. Rep., Vol. 4, p. 1068, note 691, citing numerous cases.

Other cases from the Oregon supreme court sustaining orders of the present Railroad Commission:

Portland Ry. L. & P. Co. v. Railroad Commission, 57 Or. 126, 105 Pac. 715.
Id. v. Id., 56 Ore. 468, (rehearing denied).
Martin v. Oregon R. & N. Co., 58 Or. 198, 113 Pac. 17.
Southern Pac. Co. v. Railroad Commission of Oregon, (December 26, 1911), — Ore. —, 119 Pac. 727.

The constitutionality of the Act was also sustained in the United States circuit court for the District of Oregon.

Oregon Railroad & N. Co. v. Campbell, 173 Fed. 957.
Southern Pacific Co. v. Campbell, 189 Fed. 182.

The latter is the case at bar. It is worthy of consideration that the first of the above-named cases was decided by Judge Wolverton, and the second by Judge Bean, both of whom were members of the supreme court of Oregon for many years.

Under a former railroad commission act of Oregon the authority of the commission was sustained. *State v. Southern Pacific Co.*, 23 Or. 424.

Believing the decision of the supreme court of Oregon is decisive of this question so far as respects the Act, as being in conflict with the constitution of the state of Oregon, we cite no further authorities and refrain from further argument thereon. Should the court, however, desire to examine other authorities, it is respectfully referred to the brief filed in this court on behalf of the same appellees in case No. 424, entitled *The Oregon Railroad & Navigation Company v. Thomas K. Campbell*, now pending. The authorities and discussion on this point will be found on pages 153 to 162 of the brief, both pages inclusive.

PENALTIES.

In the bill of complaint, clause (i), paragraph XII (Rec. 46) appellants summarize thus their allegations as to the penalties prescribed by the Act and their effect:

> "Said Railroad Commission Act is void and of no force and effect in this: that it provides for excessive and unusual penalties, fines and punishments, and thereby deprives the complainants and other common carriers and other citizens of the United States of the equal protection of the laws and thereby takes property without due process of law."

Clause (i) of paragraph V of the Assignment of Errors is in the same language (Rec. p. 64).

It is difficult to extract from the bill just what appellants are complaining of respecting penalties. We assume, in virtue of the latter part of their statement, they are seeking to invoke the protection of the fourteenth amendment to the constitution of the United States.

ATTORNEYS' FEES.

The only provision of the Act quoted by appellants in their bill is section 51 (Rec. p. 40) as follows:

> "If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this Act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such railroad shall be liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation together with a reasonable counsel or attorneys' fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case; provided, that any recovery as in this section provided shall in no manner affect a recovery by the state of the penalty prescribed by such violation, and that the damages provided in section 26 hereof, awarded the aggrieved party, by reason of cars not being furnished when applied for shall be in lieu of the treble damages awarded by this section."

This section has been sustained as constitutional by the supreme court of the state of Oregon.

Martin v. Oregon R. & N. Co. 58 Or. 198, 113 Pac. 17.

Provisions of statute allowing attorneys' fees sustained:

Riverside Mills v. Atl. Coast Line R. Co., 168 Fed. 990.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73.

The federal Act to Regulate Commerce contains a similar provision for the recovery of attorneys' fees (section 8).

See also *C. B. & I. R. Co. v. Feintuch*, 191 Fed. 482.

There are some of the usual general allegations of the danger appellants will be exposed to "of excessive fines and penalties provided for in the Act" and of actions the "Attorney General of the State of Oregon threatens to and will institute" * * * "to recover said penalties" unless restrained by the court," etc.

However, the only penalties referred to in the bill of complaint are those found in the section above quoted.

Admitting this generalization is sufficient as a pleading, it is doubtful if the sections of the act relating to penalties are properly before the court in this case or that the question can be presented in the manner attempted for two reasons:

First—No penalties are sought to be recovered.

Second—The sections providing penalties are wholly separable from the remainder of the Act.

United States ex rel. Atty. General v. Del. & Hudson Co., 213 U. S. 366, 417.

PENALTIES NOT UNDULY SEVERE.

It is uncertain from the bill whether complaint is made that the penalties prescribed are so severe that the whole act is necessarily unconstitutional, or, considered with the review provisions, it is still unconstitutional. If based on the first contention, the bill cannot stand. The severity of the penalty is primarily, a matter for legislative discretion, and in statutes of a character like the one under consideration, penalties must necessarily be of greater severity than in cases where the rewards for disobedience would not be so great. This is a matter for legislative, and not for judicial discretion.

Southern Express Co. v. Commonwealth, 92 Va. 59, affirmed, without opinion, 168 U. S. 705.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339.

The carriers have an efficient way of avoiding the severity of the penalty—by truly obeying the laws of the state. If they do this, they are in no danger of the penalties; if they do not, they are in no condition to complain of the laws.

Burlington, C. R. & N. Co. v. Dey, 82 Iowa, 312, 341 (sustaining the penalty provisions of the Iowa Railroad Commission Act, which imposed fines from $1000 to $5000 for the first violation, and of not less than $5000 nor more than $10,000 for a second offense).

In the case of *Oregon Railroad & Navigation Company v. Campbell*, 173 Fed. 957, at page 988 *et seq.*, the court discussed the penalty provisions

of the Oregon Act, as they existed prior to the amendment of section 33, concluding at page 990 as follows:

> "Now it is urged that the case of *Ex parte Young*, 209 U. S. 123, is decisive of the particular point here presented. The statutes under consideration in that case, however, were most severe and drastic. For a violation of the act, if by a natural person, a fine of from $2500 to $5000 was imposed for the first offense, and double that for each subsequent offense, and a like fine was imposed if the carrier was a corporation. Another section of the act fixed passenger rates at two cents per mile, and provided that any railroad company, or any officer or representative thereof, violating any of the provisions of the act should be guilty of a felony, and subject to a fine not exceeding $5000, or imprisonment in the state prison not exceeding five years, or both. Another section provided for the regulation of freight traffic, and made any violation of such regulation a misdemeanor, punishable by imprisonment in the county jail. It will be seen at once that there is no comparison between the penalties imposed by the Oregon statute and that of Minnesota, and the difference is so wide as to render the Young case not authoritative here.
>
> "Nor do I think that the penalties imposed are exorbitant or burdensome for willful violations of the provisions of the act. They were designed to secure an enforcement of the law, and I discover no intendment to prevent the railroad companies concerned having ample recourse to any court having jurisdiction for relief."

Considering the purpose for which the penalties are inflicted, the fact that by the express provisions of the statute the penalties must be recovered by a separate action, that the railroad has its defense and its day in court, that a review by the courts is provided of the orders of the Commission, and the statute gives them precedence over all other civil matters, it is difficult to see how the law deprives appellants of due process of law or of any defense they may have to protect their property rights.

It should also be borne in mind that, since the passage of the original Railroad Commission Act, and prior to the commencement of the suit at bar, the Act was amended relieving the carriers from all possibility for penalties pending a hearing by the court.

Indeed it is difficult to see what possible criticism can be made of the amended Act.

It is not improbable appellants' allegations respecting the provisions of section 33, found on page 41 of record, were made under a misapprehension of the facts, for the bill of complaint as filed, prior to amendment by consent, contained the *original* and not the *amended* section. Otherwise it is difficult to see their applicability to the amended section.

PENALTIES PROVIDED IN ACT TO REGULATE COMMERCE.

The penalties provided by Congress for violations of the Act to regulate commerce are far more dras-

tic than those provided by the Act creating the Railroad Commission of Oregon. As illustrative, under the Act to regulate commerce the doing of anything prohibited or declared unlawful or of willful omission of a thing required is made a misdemeanor with a fine not to exceed $5000 for each offense and if an unlawful discrimination, two years imprisonment may be inflicted in addition (Sec. 10, Act to Regulate Commerce). For false billing, classification or weighing, a fine of $5000 and two years imprisonment is provided (Sec. 10, Act to Regulate Commerce). For rebating, a fine of $1000 to $20,000 for each offense with a possible imprisonment of two years is provided (Sec. 1, Elkins act). Failure to obey an order is punished by a fine of $5000 for each offense and each distinct violation is a separate offense (Sec. 16, Act to Regulate Commerce). Failure to attend and testify or produce books and papers is punished by a fine of $100 to $5000 with an imprisonment of not more than one year or both (Immunity of Witness Act).

PENALTY PROVISIONS MUST BE CONSIDERED WITH OTHER PROVISIONS.

The penalty sections of the Act must be considered with other sections connected with the same subject matter.

Sections 32 to 35 provide procedure by which any corporation dissatisfied with any order of the Commission may commence a suit to vacate the same, and section 33 provides for the issuing of

an injunction suspending the operation of any such order upon order of court and giving bond provided by the Act. If the court issues an injunction suspending the order of the commission, penalties run during the pendency of the restraining order.

RULE WHERE PART OF ACT IS CLAIMED TO BE UNCONSTITUTIONAL.

Where part of a statute is unconstitutional, the courts do not declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so closely connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other. This is the rule, though the constitutional and unconstitutional provisions be contained even in the same section, if distinct and separable. This court has construed the penalty provisions of commission and rate regulation acts as severable from the remainder of the act.

Cooley, Const. Limitations, 7th Ed, p. 246.

Reagan v. Farmers L. & T. Co., 154 U. S. 362, 395-6.

Willcox v. Consolidated Gas Co., 212 U. S. 19, 53, 54.

Fleischner v. Chadwick, 5 Ore. 152, 154.

State v. Wiley, 4 Ore. 184, 187.

C. B. & Q. R. Co. v. Jones, 149 Ill. 361, 387.

State v. Railroad Commission, 52 Wash. 17, 33.

St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317, 359.

R. R. Comm. v. Central of Ga. Ry. Co., 170 Fed. 225, 239.

EX PARTE YOUNG.

On argument below, appellants relied upon the decision in *Ex parte Young*, 209 U. S. 123, to support their allegations as to the effect of the penalty provisions of the Oregon Act. The circuit court below, in *Oregon Railroad & Navigation Co. v. Campbell*, 173 Fed. 957, has effectually distinguished the Young case from those which can arise under the Oregon Act, both under the facts and on the law.

In the *Young* case, the supreme court laid great stress upon the fact that the rates were established without any prior hearing having been had, and said (page 148):

> "To impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given), only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event."

The court says:

> "We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The acts attacked were legislative maximum rate acts with drastic penalties, one fixing passenger rates, one commodity rates. An order of the Minnesota railroad and warehouse commission was also attacked. The acts in question were mandatory and conclusive and did not purport to be a general plan of regulation. No hearing was had, no opportunity to inquire into the reasonableness of the rates given, no review provided. We quote from the opinion (page 145):

> "For disobedience to the freight act the officers * * * of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days." * * * "Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding $5000 or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment."

The sale of each ticket above the price permitted by the act would be a violation thereof. The court

also (page 146) calls attention to the fact of the officers, agents or employes of the company having to take *"the risk of imprisonment for years as a common felon."*

It is now sought to apply the doctrine of the *Young* case to every act, state or federal, creating a regulative commission, and by construction make it cover cases and acts to which it has no application.

PROCEDURE UNDER OREGON COMMISSION ACT: ADEQUATE PROTECTION OF CARRIERS AND REMEDY.

Examination of the Oregon Act shows the legislature has provided full protection against any unlawful or unjust action of the Commission, and has made ample provision for a full hearing of the railroad.

The only possibility of a jail sentence is under section 29, which makes the refusal to testify, produce books and papers, etc., a misdemeanor, punishable by fine of from $100 to $1000 or by imprisonment in the county jail for not more than one year.

After complaint is filed and before proceeding with the investigation, the railroad complained against must be given ten days notice of the complaint, and then at least ten days notice of the time and place of hearing; all parties are entitled to be heard and have process to enforce the attendance of witnesses.

Other provisions for the purpose of securing a full and complete hearing to all concerned are pro-

vided. No lawful order can be made without observing all the jurisdictional requirements (Sec. 28-29).

The order is not conclusive, but is made *prima facie* lawful, subject to review as provided in section 32 and section 33 as amended.

The court's attention is called to the provisions of the various sections quoted in the statement in this brief as indicating with what care the legislature provided not only every opportunity for the railroad to be heard, but also ample and adequate remedy in the courts to review the orders of the Commission and in the meantime on cause being shown to suspend the operation of the orders. Provision is also made for expediting the trials both in the circuit and supreme courts.

RAILROAD MAY MAKE COMPLAINT WITH LIKE EFFECT AS INDIVIDUAL.

Further, if any order made by the Commission is or becomes unreasonable in operation, the law makes ample provision for the correction of the order by the Commission itself, on the application of the aggrieved railroad. Section 28 provides that

> "This section shall be construed to permit any railroad to make complaint with like effect as though made by any person, firm, corporation, or association, mercantile, agricultural or manufacturing society, body politic or municipal organization."

The same section provides:

> "Upon complaint of any person, firm, corporation or association, or of any mercantile, agricultural or manufacturing society or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory * * *"

—the Commission may investigate the same and make an order substituting a reasonable or non-discriminatory rate, etc.

Section 30 provides:

> "The Commission may at any time, upon notice to the railroad, and after opportunity to be heard as provided in section 28, rescind, alter or amend any order fixing any rate or rates, fares, charges or classification, or any other order made by the Commission, and certified copies of the same shall be served and take effect the same as herein provided for original orders."

Rates may be unreasonable from either one of two standpoints: they may be unreasonably high, from the standpoint of the public, or unreasonably low, from the standpoint of the railroad. If a rate be too high from the standpoint of the public provision is made for the filing of complaint by the public or its representative with the Commission, and for investigation by that tribunal and the fixing of a reasonable rate.

If a rate be too low to be reasonable, the carrier may advance the same without the consent of the

Commission, except in cases where the rate has previously been fixed by the Commission, after notice and hearing, as reasonable. In that event, by section 28 the railroad is given the right to complain to the Commission that the rate fixed is in "any respect unreasonable," and by section 30, the Commission, after notice and opportunity to the railroad to present its case, may alter or amend its order. The rate reasonable yesterday may become unreasonable tomorrow, and the Oregon Act is well designed to give the railroad the same privilege of correction of orders to conform to changed conditions that it gives every other citizen. In the court below, appellants contended they were deprived of the opportunity to make complaint of the unreasonableness of a rate before the Commission, but this, we submit, is based on a misconception of the language and intent of the statute.

Indeed, it would be difficult to frame a statute which would more carefully guard the rights of the parties. No authority of which we are aware has ever held that a statute containing provisions such as are found here does not constitute "due process."

It is not alleged by appellants that they were in any particular denied any of these rights under the law, that the Commission did not follow the law, that appellants did not have every opportunity to present any and every fact they desired. On the contrary it affirmatively appears otherwise from the bill of complaint. At the hearing appellants were represented by counsel, testimony taken and

argument had. The case was investigated in the manner required by law, and the order made after due deliberation.

VENUE OF SUITS IN STATE COURTS.

The provision of the Act, section 32, which confers jurisdiction on the circuit court of the state of Oregon for Marion county is not subject to criticism. It deprives appellants of no constitutional rights. Marion county is the county of the state where the capital of the state is situated and all state offices located. The office of the Railroad Commission is by law required to be maintained in the capitol.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.

In the court below they contended, and we assume in this court, appellants will contend that this provision of the statute deprives "the complainants of their right to litigate their cause in any court of the state, and in the courts of the United States, and is thereby violative of the fourteenth amendment to the constitution of the United States," citing certain cases.

Before referring to the cases cited, it may be said:

1. The state has the right to fix the venue of suits against its officers in its own courts.

2. No attempt is made by any provision of the Act to limit in any wise the rights of parties to appeal to any court having jurisdiction.

In *Oregon Railroad & Navigation Company v. Campbell*, 173 Fed. 957, in passing on this question at page 990, the court says:

> "I discover no intendment to prevent the railroad companies concerned having ample recourse to any court having jurisdiction for relief."

The cases cited by appellants were *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, and others of like nature.

Counsel saw their inapplicability and in the brief in the court below stated the cases cover "state statutes subjecting a foreign corporation authorized to do business within a state to restrictions which would prevent such corporation from litigating its rights in the federal courts or removing suits or actions brought against it to the federal courts."

Where, however, is the application of such cases to the Act in question? No such provision is found in the Act, and it will certainly not be presumed the legislature intended to enact an unconstitutional provision, nor will a court so construe the Act, unless compelled to by virtue of the language used or the necessary effect of its operation. The utmost that could be claimed is that if the section is construed as coming within the condemnation of the law announced in the cases cited, *the particular section, not the entire act*, would be void.

But why should it be so construed when neither the language, purpose nor its effect require it?

SHOULD APPELLANTS HAVE EXHAUSTED THEIR REMEDY IN THE STATE COURTS BEFORE BRINGING THIS SUIT?

Considering the provisions of this act, it is a matter of grave doubt under the authority of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, whether appellants should not have exhausted the remedy provided by the Act itself for the determination of the reasonableness of the rates fixed by the order before resorting to the federal courts for relief.

DUE PROCESS OF LAW—RIGHT TO JUDICIAL INVESTIGATION OF REASONABLENESS OF RATES.

As just pointed out, it would seem appellants had but to follow the provisions of the Act to have secured relief, and the remedy afforded them is plain, adequate and speedy.

It is not to be assumed that state courts are any less careful of the rights of litigants than are federal courts, nor is this assumption the basis of the jurisdiction of federal courts in cases of this character.

In the light of the facts, and of the letter and spirit of the law, it is somewhat difficult to believe appellants urge this point seriously, but it would rather seem they use it as a dragnet in the hope something may be entangled in its meshes.

In the court below no specific suggestion was made as to how or where appellants were denied due process, and it may be nothing will be urged

in this court. However, appellees must proceed upon the theory that the various assignments of errors will be presented.

Of late in many instances the case of *Chicago, M. & St. P. R. R. Co. v. Minnesota*, 134 U. S. 418, is cited in support of the allegations of the lack of due process of law in cases of this character irrespective of the law under review and the law before the court in that case. The same case is sometimes attempted to be used as authority for the proposition that courts will inquire into the reasonableness of rates from a mere traffic and not a constitutional standpoint. The following expression in the opinion is that generally quoted:

> "It" (referring to the order) "deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Necessarily this statement was based on the particular facts before the court, and applied and was intended to apply to those facts and the law as it had been construed by the supreme court of Minnesota.

Taking this extract from this decision and the declaration of the Oregon Act, section 12, that "the

charges made for any service rendered or to be rendered * * * shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful," it is contended the carrier has the right to a judicial determination of the reasonableness of the rate in the ordinary meaning of the word reasonable, considered purely as a traffic matter.

In other words, after the commission has heard and passed on the question as to the reasonableness of a particular rate as a traffic proposition, the same question is to be heard and determined again by a court.

THE MINNESOTA CASE IS NOT AUTHORITY FOR THIS CONTENTION.

In the Minnesota case, this court was bound by the construction put upon the act then in question by the Minnesota supreme court, thus set out in the opinion:

> "The supreme court [of Minnesota] authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but *final and conclusive* as to what are equal and reasonable charges; that *the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact;* that, under the statute, the rates published by the

commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable." (Italics ours).

In the majority opinion the court said:

"No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

The court, it will be observed, did not undertake to say whether the particular rates in question were or were not reasonable. It simply held under the statute in question due process of law was denied.

There was some general discussion of the subject which may be misleading if superficially read, but when taken in connection with the concurring opinion of Mr. Justice Miller and viewed in the light of later cases decided by the supreme court, the meaning of the court cannot be doubted. The proposition as stated by Mr. Justice Miller is that neither the legislature nor the commission acting under this authority can establish arbitrarily, and without regard to justice and right, a tariff of rates which is so unreasonable as practically to destroy the value of property.

In the case of *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 749, the court, reviewing the Minnesota case, said:

"What this court said about the Minnesota statute can have no application to the present

> case unless it be made to appear that the constitution and laws of California invest the municipal authorities of that state with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject."

The court then quotes with approval the following language from the case of *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 306-7, 309, 315:

> "But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation have come to a different conclusion as to the reasonableness of the rates fixed."

Let us see where this contention would lead to. *If the reasonableness of a rate, as a mere traffic proposition, is a judicial question, then the court may, in any case, review the finding of the Commission on this question.* If the court may determine the reasonableness of a rate in the sense indicated it may declare, and indeed would be driven to say, what is a reasonable rate to be charged in the future, and, therefore, usurp purely legislative and administrative power.

The Minnesota case is authority against this proposition, and not in its favor.

Under the facts and law now before the court, how can appellants urge they have been denied due process of law or that on the facts as alleged in the bill of complaint and exhibits made a part thereof the *Minnesota* case is authority for such contention? A forceful discussion of this same point based on the *Minnesota* case will be found in *State ex rel. Oregon R. & Navigation Company v. Railroad Commission of Washington*, 52 Wash. 17, at pages 27, 30-31.

DUE PROCESS OF LAW DOES NOT ALWAYS REQUIRE THE ACTION OF A COURT.

Due process of law merely requires such tribunals as are proper to the subject in hand. Reasonable notice and a fair opportunity to be heard before some tribunal before the issues are decided on are the essentials of due process of law.

In *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, at page 571, Mr. Chief Justice Fuller, speaking for the court says (italics ours):

> "The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; *that the state has power to exercise this control through boards of com-*

missioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, *by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious;* and that the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States."

Citing

Nashville, C. & St. L. Co. v. Alabama, 128 U. S. 96.

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26.

Dent v. West Virginia, 129 U. S. 114.

Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386.

Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364.

The following cases also discuss and define what constitutes due process of law:

Kennard v. Louisiana ex rel. Morgan, 92 U. S. 480, 482.

Davidson v. New Orleans, 96 U. S. 97, 102.
Brown v. New Jersey, 175 U. S. 172, 176.
Public Clearing House v. Coyne, 194 U. S. 497, 508.

The right of appeal is not an essential element in due process of law.

Raetz v. Michigan, 188 U. S. 505, 508.

PRESCRIBING RATES FOR THE FUTURE A LEGISLATIVE FUNCTION.

That the fixing of reasonable rates to be charged in the future is for the legislature and not for the judiciary is too well established by the decisions of this court to require citation of authorities. Courts set aside the orders of rate commissions only when their powers have been exercised beyond their jurisdiction, or their discretion has been abused, or a constitutional right has been impaired and property confiscated under the guise of regulation.

Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 397.
San Diego L. & T. Co. v. National City, 174 U. S. 739, 754.
Knoxville v. Knoxville Water Co., 212 U. S. 1.
Willcox v. Consolidated Gas Co., 212 U. S. 19.
Interstate Commerce Commn. v. Cincinnati, etc., R. Co., 167 U. S. 479, 499.
McChord v. Louisville & N. R. Co., 183 U. S. 483, 495.
Home Tel. & T. Co. v. Los Angeles, 211 U. S. 265, 278.

Honolulu R. T. Co. v. Hawaii, 211 U. S. 282, 290-291.

Prentis v. Atlantic Coast Line, 211 U. S. 210, 226.

Several of the foregoing cases concede that the legislative power to fix rates for the future may be delegated to an administrative tribunal. This point, in the light of the decision of the Oregon supreme court upholding the delegation of power, needs no further discussion.

THE ACTION OF THE COMMISSION HAS THE EFFECT OF LAW.

Whether the legislature names the specific rates directly, or it adopts general rules and delegates power to a commission to apply them to specific facts and to exercise its discretion in respect thereto, the result is the same,—the ultimate act is legislative. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power.

Knoxville v. Knoxville Water Co., 212 U. S. 1.

Prentis v. Atlantic Coast Line, 211 U. S. 210.

Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282.

Atlantic Coast Line Ry. Co. v. North Carolina, 206 U. S. 1.

Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

Texas & Pac. Ry. Co. v. Mugg, 202 U. S. 242.

Texas & Pac. Ry. Co. v. Cisco Oil Co., 204 U. S. 449.

"UNREASONABLE," AS USED BY COURTS IN PASSING ON REASONABLENESS OF RATES FIXED BY LEGISLATIVE AUTHORITY, MEANS CONFISCATORY.

The law is well settled that the word "unreasonable" in the sense it is used in the cases means "confiscatory." That appellants appreciate this fact is shown by their weaving into the bill of complaint as a cause of suit, *pro tanto* confiscation —not *actual confiscation*—merely at the worst a reduction in revenue.

This court has uniformly held it will not interfere with orders of state commissions, municipal ordinances, or state statutes, unless it finds that the rates prescribed therein are confiscatory. Perhaps the leading case on this proposition is the case .of *San Diego Land & Town Company v. National City*, 174 U. S. 739, where it was held that the constitution of the state of California, which provided that water rates should be fixed annually by a board of supervisors, or city or town council, by ordinance or otherwise, and a statute in accordance with the constitutional provision, afforded due process of law. In that case it was held that the rates so fixed were not so unreasonable as to call for judicial interference. Mr. Justice Harlan laid down *in extenso* the rules by which the power to be exerted by the court in injunction proceedings should be determined. While the constitution did not provide for a hearing, the supreme court of California had decided that the constitution and statute of the state forbade the arbitrary fixing of rates without reference to rights.

In *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, the supreme court of California had said:

> "The constitution does not contemplate any such mode of fixing rates. It is not a matter of guesswork or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

After quoting at length from this decision of the supreme court of California, Justice Harlan said in the above cited case (174 U. S. p. 754):

> "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all

the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." [Citing *Chicago and Grand Trunk Railway v. Wellman*, 143 U. S. 339, 344; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362-399; *Smyth v. Ames*, 169 U. S. 466; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 615.]

Further on in the opinion, at page 759, the court said:

"The only issue properly to be determined by a final decree in this cause is whether the ordinance in question, fixing rates for water supplied for use within the city, is to be stricken down as confiscatory by its necessary operation, and therefore in violation of the constitution of the United States. If the ordinance considered in itself, and as applicable to water used within the city, is not open to any such objection, that disposes of the case so far as any rights of the appellant may be affected by the action of the defendant. * * *

"Upon a careful scrutiny of the testimony our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by the defendant's ordinance, looking at them in their entirety and we cannot properly look at them in any other light—are such, as amount to the taking of property without just

compensation, and therefore to a deprivation of property without due process of law. There is evidence both ways. But we do not think that we are warranted in holding that the rules upon which the defendant's board proceeded were in disregard of the principles heretofore announced by this court in the cases cited. The case is not one for judicial interference with the action of the local authorities to whom the question of rates was committed by the state."

In the *Knoxville Water Company* case, 212 U. S. 1, a suit was brought to arrest the operation of an ordinance of a municipality on the ground that the ordinance was void and of no effect. After dealing specifically with the facts in the case, this court announced certain rules to be followed in cases where rates for public service corporations, fixed by tribunals in accordance with law, were attacked in the federal courts. We quote (page 16):

"The jurisdiction which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the constitution of the United States. * * * In *San Diego Land and Town Company v. National City*, 174 U. S. 739, 754, this court said 'judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant

attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use.'

"And in *San Diego Land and Town Company v. Jasper*, 189 U. S. 439, after repeating with approval this language, it was said (p. 441): 'In a case like this we do not feel bound to examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was possible for a fair-minded board to come to the result which was reached.'

"It cannot be doubted that in a clear case of confiscation it is the right and duty of the court to annul the law. Thus, in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, where the property was worth more than its capitalization, and upon the admitted facts the rates prescribed would not pay one-half of the interest on the bonded debt; in *Covington, etc., Turnpike Co. v. Sandford*, 164 U. S. 578, where the rates prescribed would not even pay operating expenses; in *Smyth v. Ames*, 169 U. S. 466, where the rates prescribed left substantially nothing over operating expenses and cost of service; and in *Ex parte Young*, 209 U. S. 123, where on the aspect of the case which was before the court it was not disputed that the rates prescribed were in fact confiscatory, injunctions were severally sustained. But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income

in any event would be substantially six per cent, or four per cent after an allowance of two per cent for depreciation. (See *Stanislaus County v. San Joaquin Co.*, 192 U. S. 201.) We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests as it does here, not upon observation of the actual operation under the ordinance, but upon speculation as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate, and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation; the inferences were based upon the operations of the preceding year; and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. The city authorities acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization, and earnings.

"The courts in clear cases ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind."

In the *Consolidated Gas Company* case, 212 U. S. 19, the court reiterated the principle set forth in the *Knoxville Water* case, saying at page 41:

> "The case must be a clear one before the courts ought to be asked to interfere with the state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates. * * * The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public."

In his work on *American Railroad Rates*, Judge Noyes discusses this question at length:

At page 250, the author says (italics ours):

> "It seems impossible to draw a constitutional statute conferring upon a court power to review upon the facts the action of the Interstate Commerce Commission in making a rate. The courts could not make a rate, for rate making is not, and cannot be, a judicial function. They cannot supervise the action of the commission for precisely the same reason. There is no difference in principle between making a rate and reviewing upon its merits the action of a commission in making a rate. In both cases the exercise of legislative, not judicial, discretion is required. A statute requiring the courts to participate directly or indirectly in making rates for the future would impose non-judicial functions and would be

unconstitutional. To repeat what we have already pointed out, it cannot be too clearly borne in mind that while the courts can determine the reasonableness of the carriers' charges they cannot, in the same way and from the same point of view, determine the reasonableness of commission-made rates.

"When a rate is made by a commission under a law it has the effect of a law *which the courts can only review upon constitutional grounds. The distinction is between the reasonableness of a charge and the reasonableness of a law.* But it may be said that the courts always have examined rates made by commissions to determine whether they are reasonable, and decisions of the Supreme Court of the United States may be pointed out where the enforcement of commission-made tariffs has been enjoined because the rates were unreasonable. But, as we have already seen, the word *'unreasonable'* in the sense of these decisions means *confiscatory.* The only ground upon which the courts could interfere with rates made by the Interstate Commerce Commission would be that they violated the fifth amendment of the Constitution —that they deprived the railroad of its property without just compensation or due process of law. And they could only have that effect when they were confiscatory."

It is also discussed on page 212, foot note.
Again at page 207:

"When a commission, in the exercise of power delegated by the legislature, makes a rate, the result is the same as if the legislature directly acted. The act of the commission supplements and makes effective the act of the

legislature. The rate resulting from the joint action of the legislature and its agent is the law. Making a rate in legal effect is making a law that such shall be the rate. The courts have only one inquiry with respect to such a rate. Is it constitutional?"

On page 226 the author sets forth his conclusions with especial regard to federal action, as follows:

"1. Rates made by Congress directly or through a commission have the force of law. Making a rate in effect is making a law that such shall be the rate.

"2. The courts can alone determine whether law-made rates conflict with the fifth amendment.

"3. The law-made rates only conflict with the fifth amendment when they deprive the railroad of its property without just compensation or due process of law; i. e., when they are confiscatory.

"4. Schedules of rates may be confiscatory. Theoretically, individual rates may be confiscatory; practically, they cannot be.

"5. A rate may be unreasonable, and therefore an unlawful charge when made by a railroad. The same charge as a law-made rate may not be so unreasonable as to be confiscatory.

"6. Courts can only pass upon the constitutionality of law-made rates. They cannot exercise supervisory power over such rates and thereby participate in the exercise of the legislative power of making rates."

In passing on this question the court below said in the case at bar:

"This court has no authority to fix rates nor should it attempt to usurp the powers of the

Commission upon its conception as to whether such powers have been wisely exercised or not. It can review the findings of the Commission only so far as to determine whether or not the rates promulgated by it will deprive the carrier of its property without just compensation. [citing authorities] nor do I think its power in this regard is any respect enlarged by the provisions of the state law for a review by the state courts of the acts of the Commission." (Rec. 56).

EXTENT OF POWER OF JUDICIARY TO CONTROL LEGISLATURE.

It is elementary that the powers of legislation possessed by legislative bodies are absolute, save as limited by the grants in the federal or restrictions in the state constitution; and that the action of the legislature is valid unless its conflict with federal or state constitution is pointed out. The sole control of the judiciary is to declare an act of the legislature unconstitutional,—the motives of the law-making body, the wisdom or justice of its enactments do not concern the judiciary. The same rule applies to the action of the legislature's agent. As said of the action of the Interstate Commerce Commission, "power to make the order, and not the mere expediency or wisdom of having made it, is the question."

Cooley, Const. Lim., (7th Ed.) 236, 241, 257.

St. Louis & I. M. R. Co. v. Taylor, 210 U. S. 281, 295.

Interstate Com. Commn. v. Illinois Central R. Co., 215 U. S. 452, 470.

PRESUMPTION ORDER IS LAWFUL.

A rate made under legislative authority is the law, and the same presumptions of constitutionality attach to it as to a statute. Every statute, including a statute fixing rates, is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt the expressed will of the legislature should be sustained, especially in the absence of any test of the statute in actual operation.

Munn v. Illinois, 94 U. S. 113.
Ruggles v. Illinois, 108 U. S. 536, 541.
Sweet v. Rechel, 159 U. S. 380, 392.
Chicago, etc., R. Co. v. Wellman, 143 U. S. 339, 344.
San Diego, etc., Co. v. National City, 174 U. S. 739, 754.
Chicago, etc., R. Co. v. Tompkins, 176 U. S. 167, 173.
Louisville, etc., R. Co. v. Kentucky, 183 U. S. 503, 511.
Knoxville v. Knoxville Water Co., 212 U. S. 1, 8.
Willcox v. Consolidated Gas Co., 212 U. S. 19, 41.

NO RIGHT TO JUDICIAL HEARING BEFORE RATES BECOME EFFECTIVE.

In view of the foregoing authorities, it probably will not be seriously urged that public service corporations have a legal right to a judicial hearing before rates fixed by law become effective. Indeed,

it cannot be doubted that this court in the *Consolidated Gas, Knoxville Water Company*, and other cases really adopted a rule of action to be followed in cases of this character to avoid the congestion of its dockets with appeals which hinged upon the illegal confiscatory nature of rate statutes.

It is fairly deducible from the opinion in the *Consolidated Gas* case, that unless a statute or order is clearly confiscatory, it must be submitted to a sufficient length of time, that its actual effect can be known, not merely guessed at, before the court will act. In other words courts will not nullify statutes on general allegations of confiscation or *pro tanto* confiscation.

NO RATE CAN BE SAID, AS A MATTER OF LAW, TO BE REASONABLE IN AND OF ITSELF.

The question is one of fact depending on many considerations. There is no legal standard by which the reasonableness of a rate can be tested.

Ill. Cent. R. Co. v. Int. Com. Comm., 206 U. S. 441.

Tex. & Pac. R. Co. v. Int. Com. Comm., 162 U. S. 197.

C. N. O. & T. P. R. Co. v. Int. Com. Comm., 162 U. S. 184.

THE COMMISSION IS AN EXPERT BODY.

The commission is an expert tribunal. It has provided for it by law means and sources of information for the purpose of being informed on the

difficult and delicate economic problems forming the basis of complaints brought before it. The performance of the duties imposed upon the commission by law makes its members experts. It is practically the only method by which the legislative body can act effectively. The courts interfere as little as may be with the determination and worth of such commissions.

Smyth v. Ames, 169 U. S. 466, 527.
Southern Pacific Co. v. Railroad Commission of Oregon (Dec. 26, 1911), — Or. —, 119 Pac. 927.
East Tenn. V. & R. Co. v. I. C. C., 99 Fed. 52, 64.
Steenerson v. Great Northern R. Co., 69 Minn. 353, 377.
Noyes, Amer. R. R. Rates, p. 206.
Redfield, Railways, (6th Ed.) Vol. 2, p. 606.
R. R. Comm. v. Ga. Ry. Co., 170 Fed. 225.
Minneapolis, etc., R. Co. v. R. R. Comm., 136 Wis. 146.

COMPARISON OF POWERS GRANTED UNDER STATE AND FEDERAL ACTS RESPECTING AUTHORITY TO FIX RATES.

As the authority of the Interstate Commerce Commission under the act to regulate commerce and the effect given its orders when made within the scope of its jurisdiction and powers have been substantially settled by this court, a very brief comparison of

the powers granted under the Oregon act and the act to regulate commerce is submitted.

Section 12 of the Oregon act provides:

> "The charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 1 of the act to regulate commerce, as amended, provides:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Under section 28 of the Oregon act the Commission is empowered on complaint or on its motion to investigate rates, fares, charges and classifications.

> "If upon such investigation the rate or rates, fares, charges or classifications or any joint rate or rates or any regulation, practice or service complained of shall be found to be *unreasonable or unjustly discriminatory*, * * * the Commission shall have power to fix and order substituted therefor such rate or rates, fares, charges or classifications as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future," etc.

Section 13 of the act to regulate commerce as amended provides for complaints, hearings and investigations. Section 14 provides for report and findings thereon. Section 16 provides that after full hearing under section 13 of the act if

> "The commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged or collected by any common carrier or carriers * * * for the transportation of persons or property * * * are *unjust or unreasonable or unjustly discriminatory*, or unduly preferential or prejudicial * * * the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged," etc.

Further comparison will show that in substance and often in language the Oregon act and the federal act to regulate commerce are alike.

Both Congress and the legislature have thus fixed the same standard beyond which a rate shall not go and be lawful. The power of the commission in both instances is limited by providing the measure or standard it shall use. Within this limit an order of either commission is in effect a law.

Both acts condemn without qualification unjust discrimination of all kinds. As differing from the mere unreasonableness of a rate in some instances, penalties are provided for such discriminations. If an unjust discrimination exists it is condemned.

CONSTRUCTION BY THIS COURT OF THE ACT TO REGULATE COMMERCE AND THE POWERS OF THE COMMISSION.

The only inquiry open to the courts is whether the order was regularly made and duly served and whether any constitutional rights have been violated. In other words, are the rates fixed confiscatory? Has the Commission under the guise of regulation acted so arbitrarily as to abuse its discretion or otherwise acted beyond the scope of its authority? The power and not the mere expediency of its exercise is the question. Upon the reasonableness and justice of a rate it may be said the determinations of fact by the Commission are conclusive.

Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452.

Baltimore & O. R. R. v. United States, 215 U. S. 481.

Southern Pacific Co. v. I. C. C., 219 U. S. 433.

Delaware L. & W. R. R. Co. v. I. C. C., 220 U. S. 235.

Interstate Com. Comm v. Chicago, R. I. & P. R. Co., 218 U. S. 88, 110.

In *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433, at page 442, the court said:

> "In the argument at bar the railroad companies do not question that if complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate that body has the authority to examine the subject,

and if it finds the rate complained of is in and of itself unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix in a new and reasonable rate, to be operative for a period of two years. *The companies further do not deny that where the Commission exercises such authority, its finding is not subject to be reviewed by the court. Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452. In other words, the argument fully concedes that an order of the Commission is not open to attack so long as that body has kept within the powers conferred by statute." (Italics ours).

It is worthy of note that appellant Southern Pacific Company in the case quoted from, is the appellant operating the lines of railroad involved in this cause. The appellee in the one case was the Interstate Commerce Commission and in the other is the Oregon Commission. Just why the principle is applicable in the one case and not in the other is difficult to apprehend.

In *Interstate Commerce Commission v. Delaware L. & W. R. Co.*, 220 U. S. 235, at page 251, in speaking of a finding of *discrimination* by the commission, the court said:

> "We say the contentions all reduce themselves to this, because in the final analysis all the other differences in so far as they do not rest upon the legal propositions just stated, are based upon conclusions of fact as to which the judgment of the commission is not susceptible of review by the courts." [Citing *Baltimore &*

O. R. Co. v. United States ex rel Pitcairn, 215 U. S. 481].

And again at page 255:

> "Moreover, the contention is not open for review, because the legal question of the right of the carrier to consider ownership under the section having been disposed of, the finding of the commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to examine."

Unless there is some reason for treating a finding of fact as to a discrimination made by a state commission on a different basis than a like finding when made by the Interstate Commerce Commission, this authority is conclusive on this point.

In *President, Managers, etc., of Monogahela Bridge Co. v. United States*, 216 U. S. 177, the bridge company had been convicted for failing to make alterations in a bridge over an interstate waterway, which the Secretary of War required. The secretary was authorized, by general act of Congress, to prescribe reasonable regulations for the conduct of navigation on the navigable streams of the United States, after due notice and hearing. The parallel between that delegation of power and the delegation of power to make reasonable rules for the conduct of transportation upon rails is obvious.

The court held that under the delegation of authority made by Congress, the power of the secre-

tary was not an arbitrary one, as he had to give due notice and opportunity to be heard and a reasonable time to comply with the orders made; that the requirements made did not amount to a taking of property for public use without due compensation; and that there had been a hearing before the secretary. The court said (page 195):

> "It does not appear that the secretary disregarded the facts or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress. It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that executive officers conform their action to the mode prescribed by Congress."

This court has repeatedly explained that the actions of the Interstate Commerce Commission can be impeached only for errors of law, and that the court does not interfere with a determination of the commission upon questions of fact, or of mixed fact and law. The determination of a reasonable rate is peculiarly a question of fact.

Illinois Central R. Co. v. Interstate Commerce Comm., 206 U. S. 441, 454.

Cincinnati, H. & D. R. Co. v. I. C. C., 206 U. S. 142, 154.

Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648.

What principle requires a different construction in the case of the Oregon act than in the case of the federal act to regulate commerce when the grants of power and the manner of their exercise are precisely the same? What but confusion can result from the adoption of different rules of construction?

THE STATE COURTS CONSTRUE THE POWERS OF STATE COMMISSIONS AND OF THE COURTS SUBSTANTIALLY AS HAS THIS COURT.

In *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 375, 376, the court in discussing this question said:

> "If * * * the legislature intended to provide that the court should put itself in the place of the commission, try the matter *de novo*, and

determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional. The fixing of rates is a legislative or administrative act, not a judicial one (*State v. C. M. & St. P. Ry Co.*, 38 Minn. 281, 298). And the performance of such duties cannot, under our constitution, be imposed on the judiciary. (*Foreman v. Board*, 64 Minn, 371; *State v. Young*, 29 Minn. 474; *Reagan v. Farmers, etc., Co.*, 154 U. S. 362). * * *

"The district court can review the findings of the commission only so far as to determine whether or not the rates fixed are so unreasonable as to be confiscatory, just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it cannot stand. * * *

"Of course, in determining whether the rates fixed are confiscatory, the court must incidentally consider what are reasonable rates, but it must also resolve every reasonable doubt on that question in favor of the findings of the commission."

See also:

Southern Pacific Co. v. Railroad Comm. of Oregon, (Dec. 26, 1911) — Or. —, 119 Pac. 727.

Minneapolis St. P. & S. Ste. M. R. Co. v. R. R. Comm., 136 Wis. 146.

Chicago, Rock Island & P. R. Co. v. Railway Commission, 85 Neb. 818, 824-5.

Spring Valley Water Works v. San Francisco, 82 Cal. 286, 306.

Jacobson v. Wisconsin Ry Co., 71 Minn. 519, 529, affirmed in 179 U. S. 287.

Morgan's etc., R. Co. v. R. R. Comm. of Louisiana, 109 La. 247, 265.

In re Amsterdam, 33 N. Y. Supp. 1009.

People v. Board of R. R. Comm., 53 App. Div. (N. Y.) 61.

Pensacola, etc., R. Co. v. State, 25 Fla. 310.

Storrs v. Pensacola Ry. Co., 29 Fla. 617.

State ex rel R. R. Comm. v. Seaboard Air Line R. Co., 48 Fla. 129.

Doubtless cases may be found where apparently the decision involved a consideration of the "reasonableness" of the rate fixed pursuant to legislative authority. But, as is indicated by the foregoing cases, the word must be taken as meaning "constitutional and such as reasonable men might have found," or else the decisions must fall. This is clearly pointed out by Judge Noyes' work on "American Railroad Rates," p. 212, note.

EXTENT OF POWER TO REVIEW.

It is a little difficult to follow counsel's argument as to the effect the review proceedings of the Oregon statute have upon the conclusiveness of the orders of the Commission.

Substantially all commission statutes, including the act to regulate commerce, provide for court review of orders made by a commission. No one would contend that a court should not interfere to prevent impairment of a constitutional right. No court can fix rates. If the order is void for any

cause and the court has jurisdiction, it will so declare. No further authorities are required to show that the words "reasonable" and "unreasonable" in the statute in connection with court authority are used and are to be construed in the constitutional sense, i. e., unreasonable in that they are confiscatory. Because a court might conclude 25 cents was a reasonable charge and a commission had fixed it at 23 cents, it would not set aside the order unless the lower rate was in reality confiscatory.

While this right of review is entirely proper and furnishes an additional safeguard for the protection of constitutional rights, it was never intended to be transformed into an instrument to endow courts with powers they cannot exercise and to defeat the purposes of remedial and necessary laws.

COURTS DO NOT PERFORM ADMINISTRATIVE FUNCTIONS—THEY PROTECT CONSTITUTIONAL RIGHTS.

Any construction which would permit the courts to review the facts *de novo*, except within the limitations outlined, would overwhelm the judiciary with administrative work, which it is not its business to perform. The courts would be at the beck and call, not alone of every carrier which desired the reasonableness of a rate reviewed, but also of every one who was dissatisfied with the determination of any other administrative functionary, and these administrative bodies would be an unnecessary expense. Courts are the proper final arbiters

as to the protection of constitutional rights and as to the final interpretation of statutes, but the legislative, the executive, and the administrative departments, within the limits of their constitutional powers, may be safely trusted to exercise a reasoning discretion and to perform their functions intelligently, fairly, and with a view to the common good.

> "The notion that commissions of this kind should be closely restricted by the courts and that justice in our day can be had only in courts is not conducive to the best results. Justice dwells with us as with the fathers, it is not exclusively the attribute of any office or class, it responds more readily to confidence than to criticism, and there is no reason why the members of the great railroad commission of this state should not develop and establish a system of rules and precedents as wise and beneficent within their sphere of action as those established by the early common law judges. We find the statute well framed to bring this about."
>
> *Minneapolis, St. P., etc., R. Co. v. R. R. Com. of Wisconsin*, 136 Wis. 146, 169.

THE COMMISSION ACT AND THE ORDER DO NOT IMPAIR THE CONTRACT RIGHT OF APPELLANTS TO PRESCRIBE THEIR OWN RATES IN OREGON.

The basis of this claim may be best stated in the language of counsel in the court below:

Section 2, article XI, of the Constitution of Oregon was, at the time of the incorporation of ap-

pellant, Oregon & California Railroad Company, as follows:

> "Corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes.
>
> "All laws passed pursuant to this section may be altered, amended or repealed, but not so as to alter or destroy any vested corporate rights."

Section 34 of the act of the Legislative Assembly, approved October 14, 1862 (the general incorporation act), is as follows:

> "Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freight for transportation of persons or property thereon as it may prescribe."

IT IS CONCEDED THE OREGON SUPREME COURT HAS HELD ADVERSELY TO APPELLANTS' CONTENTION.

Counsel for appellants, in argument in the court below, said:

> "It is claimed that under these constitutional and statutory provisions the articles of incorporation constitute a contract which the state cannot impair by the creation of a railroad commission, giving such commission authority to prescribe or fix rates, and inasmuch as the articles of incorporation of the Oregon & California Railroad Company were executed on March 16, 1870, and those of its predeces-

> sors in interest, prior thereto, and while these statutory and constitutional provisions were in effect, that the Railroad Commission act and the order of the Commission thereunder are and each of them void."

It is but fair to say counsel conceded that the Supreme Court of Oregon in passing on this very question held otherwise.

We again quote from the brief of appellants in the court below:

> "It must, however, be conceded by us that the Supreme Court of this state, following *Wells Fargo & Co. v. Oregon Railroad & Navigation Company*, 8 Sawyer 600; s. c. 15 Fed. 561, and *Ex parte Koehler*, 11 Sawyer 37; s. c. 23 Fed. 529, has held that this provision of section 34 of the act of October 14, 1862, read in connection with the articles of incorporation of the Oregon & California Railroad Company, did not constitute a contract between the state and that company, the obligation of which could not be impaired by subsequent legislation. See *State v. S. P. Co.*, 23 Or. 424, 432."

It would seem the decision of the Oregon Supreme Court, construing the reservation of power over corporations formed under authority of its Constitution, would be decisive, especially as the Oregon Constitution also contains a prohibition of the impairment of contracts. In a recent case in that court, later than the one referred to by counsel, the railroad company involved was endeavoring to justify a discrimination shown to ex-

ist by setting up a pre-existing contract calling for the lower rate upon the favored branch line. The state Supreme Court stated that the order of the Commission was claimed to violate Oregon Constitution, Art. XI, Sec. 2, *supra*, and also Art. I, Sec. 21, thereof, "No * * * law, impairing the obligations of contracts, shall ever be passed." The court said:

> "In *Ex parte Koehler*, 23 Fed. 529, in construing the foregoing clause, interdicting the deterioration or extinction of any established privilege of a corporation, it was held that the railway company formed under the general corporation act of Oregon had a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the legislature could not impair or destroy. The reasonable standard thus guaranteed to a common carrier is a standard which necessarily fluctuates, so that a rate which would, when adopted, have been deemed justifiable, may not thereafter be so regarded, owing to the increased traffic and the improved facilities whereby the cost of transportation is lessened. The authority of a railroad company to collect reasonable fares and charges, though a vested right, is, like all other interests, subject to the police power of the state, which may be exercised to promote the public welfare, and to establish between the common carrier and the passenger or the shipper, rules calculated to prevent the conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as reasonably consistent with a like enjoyment

of rights by others. Cooley, Const. Lim., (6th Ed.) 704.

"A grant by the Legislative Assembly to a corporation of authority to employ the right of eminent domain necessarily implies a reservation of the police power to regulate and prescribe the measure of the compensation which is determined to be reasonable, and which may be collected for transportation of passengers and freight; and if a common carrier could, by a contract stipulating the continuance of a specified rate of fares and freight for a given time, prevent any interference with such agreement, by invoking the clauses of the organic act relied upon herein, it would thereby become superior to the legislature, which doctrine will never be acknowledged by the courts. The police power, being necessary to the preservation of the rights of the citizen and to the maintenance of the autonomy and the authority of the state, cannot be bargained away in any manner whatever. Cooley, Const. Lim., (6th Ed.) 340."
Portland Ry. L. & P. Co. v. Railroad Comm. of Oregon, 56 Or. 468, 478-9.

That the Oregon court has properly interpreted the express reservation of power contained in the Constitution, and the implied power of the state to preserve its own sovereignty and autonomy, will be apparent from the authorities. They are too numerous even to cite here; if the court desires to pursue this further, the subject is well reviewed in an article by Lyne S. Metcalfe, Jr., 32 Central Law Journal, 181, which cites the authorities up to the time the article was written.

This court in *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, also announced the same doctrine.

See also

Missouri P. R. Co. v. Kansas, 216 U. S. 262.

THE EXEMPTION FROM CONTROL, IF ANY, WAIVED BY SOUTHERN PACIFIC COMPANY BY ACCEPTANCE OF STATUTE AUTHORIZING ITS LEASE.

Moreover, it appears by the complaint that the Oregon & California Railroad Company leased its property to the Southern Pacific Company—a foreign corporation; that said lease was made on the first day of July, 1887. Prior to 1887, the state law did not authorize one railroad to lease the property of another. The Oregon Legislative Assembly passed an act, filed February 17, 1887, authorizing leases to be made under certain conditions. The second paragraph of section 1 of this act reads as follows:

> "2. That the state of Oregon reserves to itself through its Legislative Assembly, and in such manner as it shall determine, the right, power, and authority to prescribe the rate to be charged for the transportation of persons and property on such leased lines, and also to prescribe and make such police regulations for the government of such roads as it may from time to time determine." Laws of Oregon 1887, page 13, L. O. L., Sec. 6735.

The history of the passage of this law and the reasons for its enactment are unnecessary to discuss, but it will be noted it was after this act became effective that appellant Southern Pacific Company leased the properties of appellant Oregon & California Railroad Company, and is now engaged in the sole operation thereof.

PRIVILEGE OF EXEMPTION IS PERSONAL WITH THE GRANTEE, AND CANNOT BE ASSIGNED BY LEASE, OR OTHERWISE TO ANOTHER.

The privilege of exemption alleged arose out of the incorporation of Oregon & California Railroad Company, an Oregon corporation. As shown by the bill, the Southern Pacific Company is a Kentucky corporation. It has for many years operated all the lines of the Oregon & California Company under a lease. The exemption privilege, if any, was personal to the Oregon & California Company, the original grantee, and could not be assigned by it and did not pass to the present operating company by the lease of the roadbed and equipment.

St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649.
Covington & L. T. Co. v. Sandford, 164 U. S. 578.

ACT OF CONGRESS GRANTING LANDS IN AID OF APPELLANT OREGON & CALIFORNIA RAILROAD COMPANY SUBJECTS IT TO STATE REGULATION.

The court will take judicial notice of acts of Congress and we call particular attention to section 9 of the act of Congress, July 25, 1866 (c. 242, 14 Stat. 239) granting lands in aid of the construction of this railroad, the terms and provisions of which were accepted by appellant Oregon & California Railroad Company.

In view of the claim now being urged by appellants as to the limitation of the power of the state over the acts, rates and practices of such appellant the pertinency of the section referred to is apparent.

> "Sec. 9. That the companies concerned shall be governed by the general laws of the respective states as to the construction and management of said railroad and telegraph line in all matters not provided for in the act."

DOES THE RAILROAD COMMISSION ACT AFFECT INTERSTATE COMMERCE?

Paragraph designated (g) of the assignment of error numbered V (Rec., p. 63) is to the effect that the Railroad Commission Act is void because it violates the commerce clause of the Constitution of the United States, in that the act attempts to confer upon the Railroad Commission jurisdiction over interstate commerce and does not limit its power and authority to commerce wholly within the state of Oregon, and that the act necessarily attempts to

and does confer upon the Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers over lines of appellants within the state of Oregon, the earnings of appellants derived from interstate traffic.

The answer to this contention is that the act neither confers nor attempts to confer the authority stated. On the contrary its provisions expressly negative even such a presumption.

This question was presented in the case of *Oregon R. & Navigation Co. v. Campbell*, 173 Fed. 957. In discussing it, at page 978 the Circuit Court said:

> "The next objection urged to the act is that it is an encroachment upon the constitutional authority of Congress, in that, in practical operation, it interferes with interstate commerce. It is one thing to determine whether the act itself attempts to regulate interstate commerce, and another to determine whether in its practical operation it is effective to that end. I assume that, if an affirmative answer is given to either of these questions, the law cannot stand. Congress is accorded, under the federal Constitution, power 'to regulate commerce with foreign nations and among the several states and with the Indian tribes.' Section 8, art. 1. By the ninth article of amendment to the Constitution it is declared that:
>
> " 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.'
> "And by the tenth article:

" 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'

"Thus is indicated, as strongly as could be, that the Constitution of the United States is but a delegation of powers, which powers, together with the implied powers that attend those that are express, necessary to a practical and efficient exercise thereof, constitute all that the general government has, or can presume to exercise. All other powers are reserved to the states, and to the people thereof—primarily to the people, as they are the repository of all power, political and civil. The whole lawmaking power out of this repository of power is committed to the several state legislatures, except such as has been delegated to the federal government or is withheld by express or implied reservation in the state constitutions. Says Denio, Chief Justice, in *People v. Draper*, 15 N. Y. 532, 543:

" 'Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who questioned its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited; for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchical or popular;

and there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions and the general arrangements of the Constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature.'

"So says Redfield, Chief Justice, in *Thorpe v. Rutland & Burlington Railroad Co.*, 27 Vt. 140, 142, 62 Am. Dec. 625:

" 'It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited man-

ner to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular state in question.'

"So it is that the national Constitution is wholly a delegation of power, and the state constitution a restriction or limitation of power; and the state legislatures may exercise all the reserved powers, save those which the people have withheld. It follows, very naturally and logically, from these premises, that the national government is without power and authority to legislate or to supervise or control in any manner the movement of commerce which is entirely within a state, or that which is appropriately termed intrastate, as distinguished from interstate, commerce. This arises simply from the want of power, the lack of delegation of power, to legislate touching that class of commerce. Upon the other hand, the sole power for the regulation of intrastate commerce rests with the state legislatures. Congress has expressly recognized this distinction of powers in the passage of the act to regulate commerce of February 4, 1887. 1 Supp. Rev. St., p. 529. The act declares that the provisions thereof 'shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state.' So it has been pertinently observed by Mr. Justice Harlan, in *Interstate Commerce Commission v. Brimson*, * * * [154 U. S. 447] to the same effect.

"The express purpose of the railroad commission act is to regulate transportation and

commerce, and common carriers thereof, within the state. This is apparent, both from the title of the act and from the provisions thereof. The title runs:

> " 'To regulate transportation and commerce, and common carriers thereof in this state, and, for that purpose, to create a Railroad Commission of Oregon,' etc.

"By the eleventh section the term 'railroad' is defined to embrace all corporations that now, or may hereafter, operate, manage, or control 'any railroad or interurban railroad * * *as a common carrier in this state.' And it is further declared that:

> " 'The provisions of this act shall apply to the transportation of passengers and property * * * and to all charges connected therewith, and shall apply to all railroad companies,' etc., 'that shall do business as common carriers upon or over any line of railroad within this state.'

"By section 13 it is required that every railroad shall file with the Commission schedules showing all rates, fares, and charges for the transportation of passengers and property, 'which it has established and which are in force at the time between all points in this state upon its line'; by section 18, that 'whenever passengers or property are transported over two or more connecting lines of railroad between points in this state,' the joint rates of charge therefor shall be reasonable and just. These general provisions indicate an undoubted purpose to limit the scope of the exercise of the Commission's powers within the state. But

by section 47 it is made the duty of the Commission to investigate freight rates on interstate traffic on railroads in the state, and when, in the opinion of such Commission, the rates are excessive or discriminatory, to present the facts thereof to the offending railroad company, and, if without avail, then to apply to the Interstate Commerce Commission for relief. From this one provision of the act, if from none other, the deduction is absolute that there was no intention on the part of the legislature of the state to enter the domain of interstate regulation of railroad traffic. The Commission is a state commission, designed to render state service, and no intendment should be deduced that it is empowered to execute a broader or an unlawful service, unless the language is explicit, unmistakably leading to such conclusion. No such language is found in the act, and upon its face it is not inimical to the commerce clause of the national Constitution."

ALLEGED INTERFERENCE BY THE ORDER WITH INTERSTATE COMMERCE.

Paragraph (h) of assignment of error V (Rec. 63), is to the effect that the order is violative of the commerce clause of the federal Constitution, and in conflict with the act to regulate commerce in this, that it "directly, materially and substantially affects the rates upon practically all the interstate shipments of appellants."

The alleged interference of the order with interstate commerce is beyond question the real gravamen of the complaint. Eliminate this and it is unlikely any suit would have been brought.

From an examination of the authorities on other questions presented, such as the constitutionality of the railroad commission acts, the allegations of *pro tanto* confiscation, etc., the conclusion is irresistable that this case is but one of a like nature with several now pending before this court attacking the powers of the states to fix and determine reasonable intrastate rates on the grounds of alleged interference with interstate commerce.

MANNER IN WHICH THE INTERFERENCE CLAIMED ARISES.

The basis for the contention of appellants lies in the fact that under their rate making rules, in some instances and to some points in Oregon, the rates from eastern points and California points cannot exceed the sum of the rate to the city of Portland plus the local rate to point of destination within the state, and from California points to points in Oregon the rate is generally arrived at by adding to the rate by steamer or rail to Portland the local rate out of Portland to point of destination within the state. Hence it is urged the state has no authority over the intrastate rates because when changed, the change affects an interstate rate. It should be noted that the combination of rates is not applied in all cases.

The bill affirmatively shows that the so-called "local" rates are rates which appellant Southern Pacific Company has voluntarily chosen to file with the Interstate Commerce Commission for use in computing interstate rates, and that the state rates

are not used as a factor in naming through interstate rates, except as the carrier chooses to adopt and file them for interstate purposes. Both of these facts in themselves make it impossible that the order can of itself have any application to interstate commerce. The simple expedient of naming specific through rates instead of publishing a mere formula would render this entire controversy unnecessary and make it impossible for the naming of a state rate to affect its interstate revenue—even indirectly.

It also appears from the bill of complaint—

1. That the order affects *class rates only*, for the carriage of commodities *between points within the state of Oregon;*

2. By its terms it provides: "*Nothing in this order contained shall be construed to apply to interstate commerce being carried on by said Southern Pacific Company over any line of railroad aforesaid.*" As has been pointed out, the alleged interference with interstate commerce is created through the method used in making rates from points outside of the state to points in Oregon over the lines of the Southern Pacific Company by said company, which is generally the terminal rate to Portland plus the local out of Portland to destination; the result being that it is alleged a reduction in a state rate necessarily reduces an interstate rate. Therefore the state has no control over the state rate. As the Interstate Commission has not control over state commerce, it necessarily follows that as to

this traffic the railroad is sovereign, and not the state, and state traffic is indeed in a "twilight zone" drifting about without compass or rudder.

AUTHORITY OF STATE OVER INTERNAL COMMERCE IS SOVEREIGN.

Before discussing the facts alleged in the bill, we will recall to the court's attention the points urged by these appellees more fully in their argument filed in *Oregon Railroad & Navigation Company v. Campbell*, No. 424, which stands for submission along with the present case.

The authority of the state in the regulation of its purely domestic commerce is sovereign, and coordinate with that of the federal government in the regulation of interstate commerce. Necessarily at times there is interference, but if merely indirect or incidental, the constitution is not violated. It is only the direct interference by the state with interstate commerce that is inhibited. The regulation of domestic commerce is exclusively a state function, and may be exercised directly by the legislature or through an agent. See authorities cited on pp. 52 and 53 of brief in *O. R. & N. Co. v. Campbell*, No. 424.

In *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 209, in speaking of the relative domains for state and federal activities, Mr. Justice Brown says:

> "First, those in which the power of the state is exclusive; second, those in which the state may act in the absence of legislation by

> Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all. The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference * * *."
>
> "There can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation may be carried on by means of a commission." *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 393.
>
> "It cannot be doubted that the making of rates for transportation by railroad corporations along public highways between points wholly within the limits of a state is a subject primarily within the control of that state." *Smyth v. Ames*, 169 U. S. 466, 521.

As said by the present Chief Justice, in *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 19, the elementary proposition that railroads are subject, as to their state business, to state regulation, cannot be successfully questioned in view of the long line of authorities sustaining the doctrine.

The principle as stated by the court through Mr. Justice Day is:

> "* * * A state or territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it

because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce."

New Mexico ex rel. McLean v. Denver & R. G. R. Co., 203 U. S. 38, 49.

The exclusiveness of the jurisdiction of the state over its internal commerce, and the inability of congressional legislation to act thereon, are pointed out in the recent decisions in

Oklahoma v. Atchison T. & S. F. R. Co., 220 U. S. 277, 285.

Oklahoma ex. rel. West v. Chicago, R. I. & P. R. Co., 220 U. S. 302, 306.

In a case involving the control of the state over intrastate commerce, the Supreme Court in *Missouri P. R. Co. v. Kansas ex rel. Taylor*, 216 U. S. 262, 283, referring to one of the propositions advanced, said:

"2. *That the order was void because it operates a direct burden upon interstate commerce.*

"To support this proposition it is urged that the charter of the Interstate Railroad Company, the builder of the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri, and therefore for an interstate railroad. This being its character, the argument proceeds to assert that the regulation of traffic on the road, whatever be the nature of the traffic, was interstate commerce,

and beyond the control of the state of Kansas. But this simply confounds the distinction between state control over local traffic and federal control over interstate traffic.

"To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless, at the same time, it was held that the incorporation of the road had operated *to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the Constitution of the United States.* Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern, and of course could not project the authority of Kansas beyond its own jurisdiction. The charter therefore left the road for which it provided subject, as to its purely local or state business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned, to the controlling power conferred by the constitution upon the government of the United States." (Italics ours).

Mr. Justice White (with him concurring Chief Justice Fuller, and Justices Peckham and Holmes), said in 193 U. S. 394 in the *Northern Securities* case:

> "Where an authority is exerted by a state which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the states if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity, between the manifestation of the power and the resulting burden.*"

REMOTE OR INDIRECT INTERFERENCE WITH INTERSTATE COMMERCE NOT SUBJECT TO CONDEMNATION.

That the exercise of legislative power by state authority may in operation have an effect upon interstate traffic does not of itself invalidate the state enactment ought not to admit of dispute.

Pennsylvia R. Co. v. Hughes, 191 U. S. 477, 488.

Martin v. West, 32 Sup. Ct. Rep. 42.

The interference with interstate commerce which is contrary to the constitution is a direct interference, not that which is indirect or remote. This has been so often held by the court that citation of authority would seem unnecessary. In our argument in *O. R. & N. v. Campbell*, No. 424, on pages 66 and 67 we have cited numerous decisions of this court which are in point.

As the discriminatory character of the rates in the rate schedule of appellants condemned by the Oregon Commission is uncontroverted in the bill, it is to be noted the court has considered the effect of a legislative prohibition of discrimination:

> "It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interterference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be

direct, and not the merely incidental effect of enforcing the police powers of the state."
Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518.

See also

Alabama & V. R. Co. v. Mississippi Railroad Commission, 203 U. S. 496, 500.
Missouri Pac. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612.

It has been suggested that *Southern Railway Company v. The United States*, decided October 30, 1911, 32 Sup. Ct. Rep. 2, — U. S. —, has modified or overruled the law as announced by this court substantially from its foundation, and that the court has substantially eliminated state authority over intrastate commerce; or, to express it in another way, Congress in effect has control over all commerce.

We do not believe the decision justifies any such construction.

To construe it so is to assume that without discussion, without the citation of a single authority, an entire body of authorities have been set aside, an act of Congress nullified, and, indeed, the Constitution itself held for naught.

The case was decided on the "*real* and *substantial relation* or *connection* between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain, namely, the safety

of interstate commerce and of those who are employed in its movement."

In other words, it was the direct effect, and not the indirect or incidental effect the court was considering.

CONGRESS IS WITHOUT AUTHORITY DIRECTLY TO REGULATE THE PURELY INTERNAL COMMERCE OF THE STATES.

This is stated by Mr. Justice Moody to be his understanding of the opinion of every member of this court. Any other construction would, as stated by Mr. Chief Justice White, "obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

Howard v. Illinois Cent. R. Co., 207 U. S. 463, 502, 505.

CONGRESS HAS EXPRESSLY NEGATIVED ANY INTENTION OF INTERFERING WITH STATE COMMERCE.

As shown in our argument in *O. R. & N. v. Campbell*, No. 424, on pages 60-62 inclusive, it is shown that the 61st Congress declined to strike out the proviso in section 1 of the act to regulate commerce, which exempts the transportation of property wholly within a state from the operation of the act. The debates show this congressional action was taken on the ground that omission of the pro-

viso might, under the doctrine in the *Employers' Liability Case*, make the whole act unconstitutional as an unwarranted interference with state commerce.

INTERPRETATION OF FEDERAL AUTHORITY BY INTERSTATE COMMERCE COMMISSION.

We have discussed this phase of the question on pages 62 to 65 inclusive of our brief in *O. R. & N. Co. v. Campbell*, No. 424. Without repeating the citation of decisions of the Interstate Commerce Commission there contained, it is enough to say that tribunal has declined to assume any jurisdiction over commerce which begins and ends in a single state, even when it is alleged the local rates touched upon or interfered with interstate commerce.

Thus, in a case strikingly similar in principle to that involved here, it held carriers had a right to advance local charges irrespective of the through rate under control of the commission. If an order required the through rate should not exceed the sum of the locals, the carriers could advance the locals and thus defeat the order. The only way to overcome this would be for the commission to name the through rate—it would have no control on the local rates.

Michigan Buggy Co. v. G. R. & I. Ry. Co., 15 I. C. C. Rep. 297.

As to state control over rates which even involve interstate rates, see, in addition to cases cited on

page 62 of argument in *O. R. & N. Co. v. Campbell*, No. 424:

Kurtz v. Pennsylvania Co., 16 I. C. C. Rep. 410.
Saunders & Co. v. Southern Express Co., 18 I. C. C. Rep. 415, 422.
Wells-Higman Co. v. Grand Rapids & I. Ry. Co., 19 I. C. C. Rep. 487, 490.

The Interstate Commerce Commission does not regard rates made by statute authority as necessarily fixing the measure of an interstate rate.

Saunders & Co. v. Southern Express Co., 18 I. C. C. Rep. 415, 421.
Hope Cotton Oil Co. v. T. & P. R. Co., 12 I. C. C. Rep. 265, 269.

Then why should the state be bound to accept interstate rates as the measure of its state rates? This would amount to a complete abdication of the sovereignty of the state as respects its own domestic commerce.

If the formula for making an interstate rate is such that a regulation of a purely state rate necessarily interferes with interstate commerce, then the regulation of that interstate rate by congressional authority would also necessarily affect the purely intrastate rate and Congress would have no power in the premises. The argument proves too much.

CONCLUSIONS DEDUCED FROM THE AUTHORITIES REFERRED TO.

It therefore appears:

(a) The power of the nation is supreme and exclusive so far as respects interstate commerce;

(b) The power of the state is supreme and exclusive so far as respects intrastate commerce;

(c) The interference by a state with interstate commerce or by the nation with intrastate commerce must be direct and not indirect, or incidental;

(d) Congress has expressly recognized the rights of the state in this control and has affirmatively exempted state traffic from the operation of the act to regulate commerce.

FACTS PLEADED IN THE BILL.

Having discussed substantially all the constitutional questions presented by the bill, we turn to the facts.

This case stands on the bill and the demurrers to it. In considering the sufficiency of the bill and the effect of appellees' demurrer, the usual rules apply: the complaint must contain a full, accurate, clear, certain and positive statement of ultimate facts. The interpretation of an ambiguous clause least favorable to the plaintiff is to be adopted. The argumentative or hypothetical is forbidden.

Defendants' demurrers admit only facts which are well pleaded, not matters of inference or argument, nor the construction of the state act, nor of the Commission's order which the pleader sees fit to ascribe when those documents are part of the bill. Nor do defendants' demurrers admit matters within the court's judicial knowledge nor facts repugnant to each other; nor does the admission go to conclusions of law.

An allegation that a rate is unreasonable and if enforced will result in large loss of revenue is not admitted by demurrer.

Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 401.
Central of Ga. Ry. Co. v. McLendon, 157 Fed. 961, 977.
B. C. R. & N. Ry. Co. v. Dey, 82 Iowa 312, 343.
Missouri Pac. R. Co. v. Smith, 60 Ark. 221.

See also

Cincinnati, etc., Packet Co. v. Catlettsburg, 105 U. S. 559.

DOES THE ORDER IN FACT INTERFERE WITH INTERSTATE COMMERCE?

The court will judicially notice that Portland is by far the largest city in Oregon, the commercial, distributing, and financial center of a large section of country. It is the terminal of a number of transcontinental railways. It is at the head of deep sea navigation, and at the junction of the Columbia and Willamette rivers, both of which are navigable for a considerable distance. A number of lines of steamers, both regular and independent, operate between Portland and San Francisco; regular lines also operate between Portland and Atlantic coast points. It is therefore a large transportation center and to and from some territories highly competitive. The appellants' railway is the only means of transportation for a large part of the territory in Oregon south of Portland.

The importance to appellants to be able to name rates on state traffic between points within the state over its lines, whether originating in Oregon or brought to Portland or any other point on its lines of railway, free from interference of any regulative authority, is apparent. The Interstate Commerce Commission has no authority, and without amendment to the federal Constitution can have no authority to regulate state traffic. If it is held any change in a local rate that may in anywise affect a through rate is an interference with interstate commerce, then the state will be deprived of all power of rate control. There never will be difficulty in using local rates within the state as part of through rates or making through rates based on some point like Portland.

Paragraph 9 of the complaint (Rec., p. 26) contains the statement as to how rates on interstate commerce will be affected by the order and in brief is as follows:

1. The Union Pacific system handles interstate commerce into Portland and East Portland; that the Northern Pacific Railway and other railways handle interstate commerce into Portland; that the Southern Pacific Company handles interstate commerce into Portland and East Portland; that all of these lines handle interstate traffic to points on the Southern Pacific lines in Oregon, applying to this traffic the local rates from Portland to points of destination, i. e., in fixing a rate to a Willamette Valley point in Oregon the rate would be found by

adding to the interstate rate *to* Portland, *the local rate from Portland to point of destination.*

2. That the traffic handled by the Southern Pacific Company from California points to points in Oregon is affected by water competition and the reduction in class rates prescribed by the order affects the movement of said traffic. We presume the pleader means that there is some relationship between rates on direct rail shipments and by water to Portland and thence by rail, and to change the local rate from Portland disturbs this relationship. This would be just as true if the ocean rate were changed.

3. Tariffs are referred to under which freight moves to points on the lines of the complainants in Oregon, and it is alleged the tariffs are on file with Interstate Commerce Commission.

4. Rates are made from California points to Oregon points on the lines of the Southern Pacific Company by using the ocean competitive rate from San Francisco and bay points and the local class rates out of Portland to destination. That a reduction in the local rates necessarily reduces the through rate.

5. That local class rates out of Portland are used as basing rates on interstate traffic from California points south of Marysville in California, and in every other state in the Union the through rate is made by adding to the rate applying from Portland the class rate from Portland to destination.

6. Other interstate rates use the present local rates as arbitraries to be added to the class or com-

modity rates applying to Portland over routes which do not require the traffic to be transported through Portland.

Certain illustrations are given showing the effect on interstate rates if the local rates are changed. One is worth more than passing notice. It is on a movement of syrup from San Francisco to Eugene, Oregon (Rec. 32). Appellants show because the rate to Eugene is based on water competition to Portland, an all-rail rate of 71 cents per hundred in less than carloads and 44¼ cents in carloads from San Francisco to Portland results, and that the reduction in the intrastate rate from Portland to Eugene reduces this through rail rate to Eugene from San Francisco from 71 cents to 63 cents per hundred and the carload rate from 44¼ cents to 34¼ cents per hundred; and the bill then refers to the long haul and low resulting *all rail rate* from San Francisco to Eugene.

Just what conclusion appellants desire the court to draw from these facts is not clear. Possibly they expect the court to shut out water competition. Because the Pacific ocean forces a low water rate to Portland, and the combination of water and rail in turn forces a low through rail rate to Eugene from San Francisco if the railroad desires to haul all rail, certainly furnishes no justification for the maintenance of an unreasonable local rate from Portland to Eugene.

That is but the result of the working of natural laws, and yet it seems to be expected to prevent an inevitable and natural effect, the court can and

should in some way maintain high local rates on state traffic from Portland to Eugene, so as to enable complainant to charge a higher all rail rate from San Francisco to Eugene. This of course could only be done by finding the Railroad Commision has no authority over rates between Portland and Eugene. It would be indeed a peculiar exercise of any court or administrative function to attempt to deprive the public of water competition or defeat natural competition by forcing the maintenance of unreasonable and discriminatory local rates because of it.

Reduced to its last analysis the bill simply alleges interstate rates into Western Oregon over its lines are largely made by using the Portland rate as a base and adding to it the local rate. Therefore the local rate cannot be changed because it will affect the through rate and therefore on domestic commerce they can charge what they see fit, provided that the sum of the two rates do not exceed a reasonable through rate—over which *through rate only* the Interstate Commerce Commission would have jurisdiction.

A mere statement of the proposition refutes it.

COMPETITIVE LINES OF TRANSPORTATION.

There are a number of steamers operating between California points and Portland and there are shipments by both rail and sea from points of eastern origin to Portland.

This competition might very naturally result in competitive rates to Portland, but because appel-

lants compete with other carriers and name through rates, with the local rate in Oregon as one of the factors, is the state to be deprived of the right to enjoy reasonable rates on domestic traffic? Is a shipper, who chooses to employ a competing line to Portland, to be deprived of a reasonable rate to distribute goods from his stock in trade? Is the public to be deprived in a measure of the benefits of water or other competition by the maintenance of unreasonable local rates because of it? Are the people on the line of appellants' railway in Oregon to be charged unreasonable rates on domestic traffic because appellants choose to use the local rate as a factor in making a through interstate rate?

The underlying theory of the bill is that, if a carrier at any time uses a local rate as a part of a formula in arriving at a through rate, no matter how unreasonable and therefore unlawful a local rate may be, no authority can change it, as an interstate rate would be affected.

It is an attempt to defeat all state control over state rates, and to control the state rates through an interstate rate by using the local rate in arriving at the interstate rate. This fact will be elaborated when that point is discussed.

MATTERS OF FACT AFFIRMATIVELY SHOWN BY THE ORDER AND COMPLAINT.

a. The rates in controversy are class rates only over the lines of the appellants between points within the state of Oregon.

b. There was a full hearing and investigation in which appellants were represented and participated.

c. No jurisdictional defect or abuse of power is alleged.

d. After due investigation and consideration of all the facts the Commission found the rates complained of unreasonable and unjustly discriminatory.

e. The Commission fixed class rates which it found to be just and reasonable and non-discriminatory over the appellants' main and branch lines on traffic between Portland and other points within the state of Oregon south of Portland.

f. The order applies to class rates only over the lines of appellants within the state of Oregon.

g. The order is not to affect any interstate commerce.

h. The rates prescribed became effective twenty days after the service of the order.

No complaint is made as to any jurisdictional defects or denial of any right or opportunity to be heard. There is no suggestion of newly discovered evidence, that the evidence did not justify the findings, that there are any facts not presented to the Commission upon which appellants will rely, or that all the facts were not submitted to the Commission.

The changes made by the order affect class rates only within Oregon, between Portland and points south thereof, as shown in section 1 of the Southern Pacific Company's Local and Joint Freight Tariff

No. 235-A. In that book of rates are published the particular rates in question as well as many other rates.

The portions of the order necessary to the consideration of this question have already been set out in this brief (page 7), *ante*, to which we refer the court at this point for greater certainty as to its language. (See Record, pp. 5-25).

Just what phraseology is required to confine an order made by a state commission to state rates, we do not apprehend. While it did not add to or detract from the operation of the order to declare explicitly it referred only to intrastate commerce, in order that there could be no question even as to the intent of the Commission or scope of the order it is set forth therein:

> "Nothing in this order shall be construed to apply to interstate commerce being carried on by said Southern Pacific Company over any of the lines of railroad aforesaid."

It is not claimed this statement would change a fact or that the court would not consider the substance rather than the form of the order. On the other hand the court will not presume the state is trying to act unlawfully. There is no reason for the claim that the decision of the Commission is an unlawful interference with interstate commerce, as by its terms it is limited to shipments from one point to another within the state, and cannot be construed to affect, nor as an attempt to affect, interstate commerce.

Railroad Commissioners v. Symns Grocer Co., 53 Kans. 207, 216.

If the order were attempted to be applied to interstate commerce, the attempt would fail and the lawful interstate rates would apply.

If made, it would be of no importance, for relief would follow instantly. No language used by the Commission could add to its powers. Nor can the order be made to govern that to which it cannot lawfully apply.

There is no distinct allegation that the order in itself in any way attempts to fix or regulate interstate rates, but all that is claimed is that the effect of the order will be to regulate them to some extent.

In the case of *O. R. & N. Co. v. Campbell*, 173 Fed. 957, before the Circuit Court below, the order then in question was criticised by the railroad company affected because it did not by its terms limit its effect to intrastate traffic.

Discussing this objection at page 981 the court says:

> "The order is not specific, however, in this: That it does not, in direct terms, say that the rates so fixed shall apply to the transportation of intrastate commerce only; but, considering that the Commission is a state organism, imbued with authority to fix rates within the state and not beyond its confines, it is but a legitimate deduction that its purpose in promulgating the order was to prescribe rates effective as relating to intrastate, and not interstate commerce. Presumptions are always in favor of the lawful exercise of a power—not that it was unlawfully exercised, or that a functionary has exceeded the authority delegated or bestowed. So that, as matter of law,

neither in the intendment of the act, nor in the draft of the order, has there been an invasion of the right and power of Congress to regulate commerce between the states."

Every presumption and rule of construction is in favor of the interpretation of the order so as to sustain it and avoid the direct interference with interstate commerce which would invalidate it.

Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa 312, 339.

Chicago, I. & L. R. Co. v. Railroad Commission, — Ind. —, 95 N. E. Rep. 364, 368—citing

New York Central, etc., R. Co. v. Interstate Commerce Commission, 168 Fed. 131.

Pittsburg, etc., R. Co. v. Railroad Comm., 171 Ind. 189.

Chicago, etc., R. Co. v. Railroad Comm., 173 Ind. 469.

Stone v. Farmers' L. & T. Co., 116 U. S. 307.

GULF, COLORADO & SANTA FE R. CO. V. TEXAS DECISIVE THAT FACTS STATED SHOW ONLY REGULATION OF STATE RATES.

The case of *Gulf, Col. & Santa Fe R. Co. v. Texas*, 204 U. S. 403, is controlling and decisive as to this question.

The court will recall the facts. There was a sale of two cars of corn for delivery at Goldthwaite, Texas. Vendor contracted with a Kansas City firm for the purchase of two cars of corn to be delivered to it at Texarkana. It was vendor's in-

tention all the time that the corn should be shipped to Goldthwaite from Texarkana, and this because of the combination of rates which existed.

The through rate from Kansas City to Goldthwaite *via* Texarkana was 35 cents.

The interstate rate from Kansas City to Texarkana was 18 cents, and the state rate, fixed by the state commission, from Texarkana to Goldthwaite 14 cents—total 32 cents, or three cents less than the through interstate rate, 35 cents. When the cars reached Texarkana, the original bills of lading were surrendered and the same cars forwarded under new bills of lading to Goldthwaite. The cars were never unloaded, nor the seals broken, and the corn was transported in the original cars without breaking bulk to Goldthwaite. At Goldthwaite the consignee tendered the charges prescribed by the state railroad commission, which the agent declined to accept and demanded and collected a larger sum. The railroad company was fined by the state court for extortion and the case was taken to the Supreme Court of the United States on a writ of error. Manifestly, the penalty imposed for violation of the state statute could not withstand attack if it unconstitutionally interferred with interstate commerce.

In passing upon the case, the court, speaking by Mr. Justice Brewer, stated the issue (page 411):

> "The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment. If so, the regulations of the state railroad commission do not

control, and the court erred in enforcing the penalty. If, however, it was a purely local shipment, the judgment below was right and should be sustained."

The court in passing upon the case *inter alia* said:

"It is, however, contended by the railway company, that this local transportation was a continuation of a shipment from Hudson, South Dakota, to Texarkana, Texas; that the place from which the corn was started was Hudson, South Dakota, and the place at which the transportation ended was Goldthwaite, Texas; that such transportation was interstate commerce, and its interstate character was not affected by the various changes of title or issues of bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite. * * * The first contract of shipment in this case was from Hudson to Texarkana. * * * When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligations to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company to be delivered by it, under its contract with such owner. * * * *Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.*

"In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had

purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. *The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made.*

"It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance and payment by the Hardin Company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits, and the carrier ought to be able to depend upon the contract which it has made, and must conform to the liability imposed by that contract." (Italics ours).

In *Southern Pacific Terminal Co. et al. v. The Interstate Commerce Commission et al.*, 219 U. S.

498, appellant Southern Pacific Company was one of the appellants.

In that case the appellants were attacking an order made by the Interstate Commerce Commission on the grounds *inter alia* that the commission by the order assumed to control and regulate intrastate commerce, citing *Gulf, C. & S. F. Ry. Co. v. State of Texas, supra*, and *Coe v. Errol*, 116 U. S. 517, in support of their contention. The court, however, held that under the facts it was commerce subject to the act to regulate commerce and that the authorities cited did not apply.

The Interstate Commerce Commission has uniformly followed *Gulf, C. & S. F. R. Co. v. Texas.* It recognizes the right of the shipper to consign his shipment where he will, pay the charges on it, take possession, and later reship under the rates lawfully applicable to this last movement, even if such rate be a local state rate, and the result (as in *Gulf, etc. v. Texas*) be a lesser rate than the published interstate rate. The latter shipment, if within the limits of a single state, is intrastate. This rule is applied in the transportation of both persons and property.

Morgan v. M. K. & T. Ry Co., 12 I. C. C. Rep. 525, 528.

Montgomery Freight Bureau v. Western Ry. of Alabama, 14 I. C. C. Rep. 150.

Marshall Oil Co. v. Chicago & N. W. R. Co., 14 I. C. C. Rep. 210.

Kurtz v. Pennsylvania Co., 16 I. C. C. Rep. 410, 412, 413.

Dobbs v. Louisville & N. R. Co., 18 I. C. C. Rep. 210.

When the charge and the actual transportation are confined to the limits of the territory of the state, it is not interstate commerce and is subject to state control.

Wabash, St. Louis & Pacific R. Co. v. Illinois, 118 U. S. 557.

Illustrations of goods which are to be treated as having a *situs* in the state, and not in transit, though shipped in from another state and awaiting sale or movement elsewhere locally, are found in

General Oil Co. v. Crain, 209 U. S. 211, 228-9.
American Steel & Wire Co. v. Speed, 192 U. S. 500, 509.

The confusion which seems to exist between the fixing of a state rate and the question of the applicability of that rate to a particular shipment is pointed out in

Southern R. Co. v. Hunt, 42 Ind. App. 90,

where it is held that in fixing local freight rates on coal, the fact the coal was interstate traffic did not affect the jurisdiction of the Commission to fix rates, since it was the local rate, and not a particular shipment, which was in controversy.

A CARRIER USING A LOCAL RATE AS PART OF A THROUGH INTERSTATE RATE DOES SO KNOWING IT TO BE SUBJECT TO STATE CONTROL.

The law requires all rates to be reasonable, state as well as interstate, and if a carrier uses a local

rate in any way as a factor in arriving at an interstate rate, it does so knowingly and subject to state control.

In *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, it was claimed that because the corporation was incorporated under an act of Congress, its operations were removed from the control of the state. Passing upon this point the court said:

> "There is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state and to other points also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the federal Constitution given to Congress. * * * We are of opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates and other police regulations."

In *Reagan v. Farmers' Loan & Trust Co.*, *supra*, will be found numerous statements sustaining state control. To the same effect see *Smyth v. Ames*, *supra*.

In the case of *Ames v. Union Pacific Railroad Company*, 64 Fed. 165, Mr. Justice Brewer, at page 171 of the opinion, says:

> "Again it is insisted that this act interferes with interstate commerce, in two ways: First, it establishes a classification of freights different from that which prevails west of Chicago; and, in the second place, by reducing local rates, it necessarily reduces the rates on interstate business. Neither of these objections seems to me to be well taken. In the first place, the classification of freights by the railroads is a purely voluntary act, not compelled by any statute, and not uniform throughout the country. There is one system which prevails east of Chicago, and one west. It might be more convenient if the classification established by this act harmonized with that adopted by the railroad companies doing business west of Chicago; but surely the voluntary act of the railroad companies, in establishing a uniform classification for certain territory, can work no limitation on the power of the state to establish a different classification. To say, for instance, that because the railroad companies have voluntarily placed flour in a certain class, on which a specified rate is to be charged, such voluntary act of mere classification destroys the power of the state to establish a classification which puts flour in another class, and subject to another rate, is, to my mind, a most extravagant pretension. Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or

for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state."

In *Armour Packing Company v. United States*, 209 U. S. 56, 82, the court says:

> "If the shipper sees fit to make a contract covering a definite period, for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate, in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

A fortiori, if a railroad company sees fit to make a state rate any part of the formula in arriving at an interstate rate, it does so subject to possible changes made in the local rate by state law.

A RATE IS A DEFINITE CHARGE FOR A WHOLE SERVICE.

It appears by the tariffs referred to that many of the interstate rates of complainants would not be affected under any circumstances by the order of the Commission. We therefore arrive at a situation where as to some local rates the state has reg-

ulative power, but as to others it cannot exercise it, because they are used as a part of a through rate.

Beale & Wyman on *Railroad Rate Regulation*, Sec. 661, is to the effect that the sole, the only test under the law is a simple one: Is the interstate rate reasonable? If not, it is unlawful. Is the local rate reasonable? If not, it is unlawful. Not whether a terminal rate plus a local is a reasonable rate, or leads to a reasonable interstate rate. These questions do not concern a court. The question is a rate, not a formula. What is to be considered is the reasonableness of the whole rate, i. e., its lawfulness.

The argument or suggestion refutes itself and entirely loses sight of what a rate is. A rate is the "definite charge fixed by the person conducting public employment as the price demanded for performing the service asked. The most salient characteristic of a rate, considered abstractly, is that it is an entirety, the single charge for the whole service performed."

Yet in this case appellants not only seek to measure local by a through rate, but do more, *claim absolute control over it irrespective of its reasonableness.*

If their contention is sound, there is no limit to the local changes they might make through the operation of their formula.

It is conceded that the state has control over intrastate rates, but it is urged this control can be eliminated by the simple expedient of using a local

rate as one of the factors in framing an interstate rate.

In *Trammel v. Clyde Steamship Company et al.*, 4 I. C. C. Rep. 120-139, the Interstate Commerce Commission says:

> "Traffic is either state or interstate traffic according to its origin and destination. It is shipped by the consignor in the state where the consignee dwells, or it is not. If not, it is interstate traffic, and when carried over two or more lines it is, by the fact of having been received, forwarded and delivered as one through shipment, transported under a common control, management or arrangement, as the case may be, for continuous carriage or shipment. * * *
>
> "The addition of a local rate to a reasonable through rate in order to fix the through charge to the local station is liable to produce a relatively unreasonable rate to that station. The difference in situation of the basing and local points in respect of through traffic is not properly measured by the local rate for carriage between them. The reasonableness of the added local, *as a local rate, is not under consideration in a case where the rate complained of is the total charge over different lines.* The total rate or charge for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority; *how the rate or charge is made is only material as bearing upon the legality of the aggregate charge, and how*

any reduction ordered may be accomplished, whether by lowering locals or proportions, is matter for the carriers to determine among themselves."

See also

Wells-Higman Company v. Grand Rapids Indiana Railway Co., 19 I. C. C. Rep. 487.

Dobbs v. L. & N. R. R. Co., 18 I. C. C. Rep. 210.

Assuming that the rates in controversy fixed by the Oregon Commission are reasonable and lawful as to intrastate traffic (and this is what appellants concede under the law they must be), appellants' contention would lead this court to say that the law appellants admit must be observed, shall be violated, and the officers of the state be enjoined from complying therewith and the people of the state be deprived of what under the law they are entitled to, at the option of the railroad. The decisions on this question under anything like similar conditions are unanimous against the position taken by the complainants. Such a proposition, in the language of the court, "simply confounds the distinction between state control over local traffic and federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation."

Wabash, St. Louis P. R. R. Co. v. Illinois, 118 U. S. 557.

Missouri Pac. R. Co. v. Kansas, 216 U. S. 262, 284.

Gulf, Colorado & Santa Fe Railroad Company v. Texas, 204 U. S. 403.
General Oil Co. v. Crain, 209 U. S. 211.
Ames v. Union Pacific R. Co., 64 Fed. 165-171.
St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317.
Southern Ry. Co. v. Hunt, 42 Ind. App. 90.
State v. Mo. P. Ry. Co., 76 Kan. 467.
Morgan v. M. K. & T. Ry. Co., 12 I. C. C. Rep. 525-528.
Lincoln Commercial Club v. C. R. I. & P. R. Co., 13 I. C. C. Rep. 319.
Montgomery Freight Bureau v. Western Ry. of Ala., 14 I. C. C. Rep. 150.
Marshall Oil Co. v. C. & N. W. Ry. Co., 14 I. C. C. Rep. 210.

It is clear, from the authorities cited, the order is not a direct interference with interstate commerce, and that the interference is only indirect and at the option of appellants who are under no legal or practical compulsion to use any particular formula in arriving at a through interstate rate, or any formula at all which involves the unstable element of a local rate.

From any view point one may examine it the proposition is sophistical and unsound.

The court is dealing with a case wherein reasonable rates have been fixed for state commerce in the manner provided by law. The court is asked to set aside this order and enjoin the collection of reasonable rates for state traffic, to declare a lawful rate unenforceable and to decree that unlawful

rates can be exacted on all state commerce because of an alleged interference with some interstate commerce.

THE CIRCUIT COURT'S DECISION.

On this branch of the case and the alleged unconstitutionality the court below (page 55, Rec.) said:

> "A large part of the discussion herein is directed to the constitutionality of the Railroad Commission act, and the contention that the order sought to be enjoined directly and materially affects interstate commerce. Both of these questions were considered and decided by this court in the *Campbell* case (*Oregon R. & N. Co. v. Campbell*, 173 Fed. 957). The opinion of Judge Wolverton in that case contains such an exhaustive, satisfactory and full discussion of the subject as to leave nothing to be added. I fully concur in his views and am unable to distinguish this case in principle from the one decided by him. The averment in the bill that the order of the Commission interferes with interstate commerce is but the conclusion of the pleader and is not in harmony with the facts alleged. Morrow, Circuit Judge, says:
>
> "'A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield.' (*Woodside v. Tonopah & G. R. Co.*, 184 Fed. 360)."

In *Oregon R. & N. Co. v. Campbell*, 173 Fed. 957, at page 982, speaking of the alleged interference with interstate commerce, the court said:

> "As has been previously shown, the Commission presumptively has acted within the scope of its authority, which was to prescribe rates applicable to the transportation of intrastate commerce only. But beyond this, it seems to be thought that if a state tariff affects an interstate tariff in the slightest measure, though incidentally, it must give way to the latter, and hence is void and inoperative. For instance, it is alleged that if the state Commission's rate becomes effective many persons will ship their commerce from without the state to Portland, and then reship to points east of The Dalles; or, in another way, wool will be shipped to Portland from points east of The Dalles, and thence east by the transcontinental rates, and thus the complainant will be compelled to re-establish its rates in order to retain its through haul from Eastern Oregon points. In other words, interstate traffic will thereby be interferred with, disturbed, and disarranged.
>
> "It is, and always will be, a difficult question to determine as to when and what commerce should be classified as interstate, and when and what should be classified as intrastate. The question depends largely upon the facts and circumstances attending each case as it arises. There can be no doubt that commerce originating within the state and carried to some other point within the state is intrastate commerce. So it is of commerce originating within the state and transported, by continuous carriage, from within to some point

without the state, or originating without the state and carried within—that is to be classified as interstate commerce. But when intrastate becomes interstate commerce and *vice versa*, is an inquiry involving nice distinctions, perhaps. But we are not concerned with that at the present time. We are dealing with the distinct question of the supposed conflict between the regulation of interstate and intrastate commerce. Let us take a commodity, for instance, manufactured in Portland. Let it be agricultural implements. The state has a perfect and undoubted right to regulate the tariff for transportation of such commodity by rail to any part of the state from Portland, so that the tariff be reasonable; and I may say to any point on complainant's lines, within the state, east of The Dalles. If that regulation interferes with present tariffs for interstate transportation of the same commodity from common points east of the Mississippi or Missouri rivers to points on complainant's lines east of The Dalles, who can say nay? But to go a step farther: The same commodity may be shipped to Portland from without the state, and put in common stock. When the commodity thus comes to rest in the state, and is sold by the dealer for transportation from Portland to some other point within the state, it is as much intrastate commerce as the case just put, and the state may, with equal authority, regulate the freight tariff. This is a condition of which complaint is made lest it be that dealers will take advantage of the local rate, and, selling to customers within the state, ship first to Portland at the transcontinental rate, and thence out to the interior at the local

rate. A shipment from the east, *via* Portland, to a point within the interior of the state, would be interstate commerce; but whether such a shipment could be made to take the classification of interstate commerce by shipment to Portland in the name of the dealer, and then of intrastate classification by the dealer billing it out of Portland again to his patron in the interior, is another question, which we need not decide. It remains clear that whenever the commodity partakes of the characteristic of intrastate commerce, the state has the right to fix the rates of tariff for its transportation wholly within the state."

LATE CASES PASSING ON ALLEGED INTERFERENCE WITH INTERSTATE COMMERCE BY ORDERS OF STATE AUTHORITIES FIXING STATE RATES.

Of late a new line of attack upon railroad regulation has been developed. It appears in two forms, *first*, to establish the principle that rates made by either national or state authority must be fixed on a basis that will yield a reasonable net return on the reproductive value of a railroad based upon impossible and imaginary conditions.

This question is not in this case.

Second, to establish as a principle that the naming of an intrastate rate by state authority that in any way conflicts or interferes with or affects an interstate rate, however made, is an unlawful interference with interstate commerce, whether the result is a change in relationship of state and

interstate rates, or is a change in the routing or the movement of freight.

The reasons for this dual attack are apparent.

PURPOSE OF ATTACK TO ELIMINATE STATE COMMERCE FROM ANY REGULATIVE AUTHORITY.

It is evident Congress cannot regulate state commerce, the state cannot regulate interstate commerce; therefore, if the railroads can maintain their theory, the regulation of all state commerce is at an end. There is no difficulty whatever in making the facts fit the theory, so that in making any interstate rate the tariff rules will include a state rate, over which no authority would have control. This alone is the reason for this latest form of attack upon state regulation.

It is a mild statement that the results of such a doctrine, carried to their logical extremity, would completely revolutionize our political and commercial life, and effect the greatest change that has taken place in our system since the foundation of the Union.

In *Mo. Pac. R. Co. v. Kansas*, 216 U. S. 262, the court, in discussing a question involving this same principle, said (page 283):

> "To sustain the proposition would require it to be held that the local traffic of the road was free from all government regulation."

In *Louisville & N. R. Co. v. Siler*, 186 Fed. 176, at page 200, the court, speaking to the identical question, said:

> "The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates, because they are local, and the state could not change them, because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that, so far as rate-making is concerned, the state railroad commission would have no reason to exist, and state regulation of state rates would become simply historic."

In *Re Arkansas Rate Cases*, 187 Fed. 290, 302, the court says:

> "If complainant's contention is correct, transportation companies, so far as the exclusively internal commerce of a state is concerned, are beyond all control, either from the state or national government; for, as determined in *Gibbons v. Ogden*, *supra*, the constitution excluded that class of commerce from the powers vested in Congress by the commerce clause, and, as all state rates indirectly affect interstate rates, they are, if complainant's contention is right, also void. See also on this point the *Employers' Liability Cases*, 207 U. S. 463, 493.
>
> "The result of such a construction would be that the states do not possess one of the most important powers inherent in every government. The adoption of such a construction by the courts would be justifiable only if any other would do violence to a plain provision of

the national Constitution or principles of law so firmly established by previous decisions of the highest court of the land that there is no longer room for construction. In the language of Mr. Justice Peckham in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 231:

> " 'If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon that subject or prohibit such contracts. This cannot be the case.' "

(The *Siler* and the *Arkansas* cases cited are now before this court on appeal).

The question before the court has been passed on directly in a number of cases, and in all but one the power of the state was upheld.

In the case of *State v. Northern Pacific Ry. Co.* (Sup. Ct. N. Dak), 120 N. W. 869, the judgment in which was affirmed by the Supreme Court of the United States in *Northern Pac. Ry. Co. v. North Dakota*, 216 U. S. 579, the state court held that a state statute fixing coal rates between points within the state, was not a regulation of interstate commerce as applied to interstate lines. The court said:

> "It is finally urged by defendant's counsel that the act in question violates the interstate commerce clause of the federal Constitution. Their argument is necessarily predicated upon the assumption that state regulation of local rates on interstate lines amounts to an interference with interstate commerce, as the act assailed, upon its face, merely purports to es-

tablish maximum rates for transporting coal in carload lots between points within the state. This question is not open to debate, as the court of last resort in this country has repeatedly held adversely to counsel's contention."

After quoting from *L. & N. R. Co. v. Kentucky*, 183 U. S. 503, the court said further:

"It is but fair to counsel for defendant to state that they concede that, up to this time, the decisions of the United States Supreme Court on this point are uniformly opposed to their contention. Even if we were disposed to entertain the views expressed by Judge Lochren in *Perkins v. Northern Pacific R. Co.* (*C. C.*), 155 Fed. 453, which we are not, we should feel it our duty, as did Judge Lochren, to yield to the judicial utterances of the final arbiter on this question."

That question was not discussed by this court in affirming the judgment, but it said the mere fact that the state court had held that the statute applied only to transportation wholly within the borders of the state disposed of the objection that the statute was a regulation of interstate commerce.

The case of *Woodside v. Tonopah & G. R. Co. et al.*, 184 Fed. 358, was heard by Judges Morrow, Farrington and Van Fleet.

We quote from the syllabus:

"A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic."

In the case at bar, the precise question presented in *O. R. & N. Co. v. Campbell* was submitted, and the court, by Bean, J., announced its full concurrence with the views as expressed in the opinion of Judge Wolverton in that case.

Shepard v. Northern Pac. Ry. Co., 184 Fed. 765, is the only case lending any countenance to appellants' contention. It is on this case appellants relied in the court below. On the face of the opinion it is apparent the facts are entirely different, for the court found interference with and discrimination against interstate commerce as well as confiscatory rates.

However, we would not be understood as approving the principles announced in that case either as to interference of the state rates with interstate commerce, or the basis of valuation used on which a return is to be allowed, as we are satisfied the effect of the *first* ruling will be to eliminate state rates from any control, and the *second*, to eliminate all state and interstate rates from any substantial control, unless it may be as to questions of discrimination.

COST OF SERVICE.

In the bill of complaint attacked by demurrer herein, no light is thrown on the cost of service, a most important consideration, none on the value of the property devoted to intrastate use, and that to interstate use, there is no allegation as to the cost of conducting state business as distinguished from interstate business, no division between passenger

and freight expenses. The sole allegations are as to the business as a whole and an allegation stating the amount of state and interstate freight revenue, and a general allegation that existing tariffs afford but slight compensation above the cost of service, which latter allegation, as will be shown later, is absolutely negatived by the facts as pleaded.

It is but fair to assume that complainants have made as strong a showing as possible, and considering the failure to state any particular and necessary facts and the generality of their allegations and conclusions, with their admissions as to earnings, no cause of suit is stated in the complaint.

In discussing this very important question, as well as other features of the bill, the court below (Rec., p. 56) said:

> "Whether rates prescribed by legislative authority to be charged by public service corporations are unreasonably low, within the doctrine stated, involves a determination of the value of the property of the complainant devoted to the particular public use to which the rates apply, the measure of a reasonable return thereon, and whether the rates allowed to be charged are sufficient to that end. These questions are complex, intricate, and often difficult of ascertainment, especially in the case of a carrier doing both local and interstate business. There is a difficulty, in the first place, in determining the value of the property as a whole, whether it is to be taken as the market value of the stock and bonds, the original cost of construction with expenses and permanent improvements added, the cost of reproduction, the

value of the property as a going concern, or whether all these matters are to be considered in fixing a fair value in a given case, and after the entire value of the properties has been determined, how it shall be divided among the several states through which the road passes. It is substantially agreed that where a railroad is used in both local and interstate business, and the value of the property devoted to public use within a given state is ascertained, that it is fair to apportion such value among the different kinds and classes of business upon a revenue basis, but it is not always easy to ascertain the revenue from interstate traffic. The records of a company commonly show the gross revenue from local traffic wholly within the state, but much of the interstate business is often carried through the state, and in other instances the local haul within the state is only a small proportion of the entire haul and it is therefore difficult to determine what should properly and rightfully be allowed for interstate traffic. But even greater difficulty lies in the apportionment of the cost of the service, between local and interstate business, so as to determine whether the revenues from a particular class are sufficient to afford a fair return upon the value of the property devoted to such class. There are many items of cost that disclose the class of business on account of which they are incurred, and can therefore be properly placed, but there is a large percentage of cost of doing all the business, like the maintenance of ways and structures, equipment, superintendence, operation of trains carrying both local and interstate traffic, which are incurred for the common benefit of both, and

there is no definite rule by which these items of common cost can be divided between the different classes with mathematical accuracy. *M. K. & T. R. R. v. Love*, 177 Fed. 493.

"These matters are not referred to because particularly material in the case in hand, nor with a design to approve or disapprove any particular rule or doctrine in reference thereto, but only to emphasize the position that a complainant seeking to enjoin rates fixed by lawful authority should state facts and not conclusions, facts which, if true, show that such rates will not or do not afford a fair return upon the value of the complainant's property devoted to the particular use. In the absence of such allegations, the presumption of law that the rates as made are fair, just and reasonable must prevail, and in my judgment the bill does not state facts sufficient to overcome this presumption."

PRESUMPTIONS AS TO PROFITABLENESS OF BUSINESS.

Under the pleadings with the facts as pleaded showing beyond question a very profitable business, the court cannot assume the rates as fixed by the order would be confiscatory or unremunerative. On the contrary all intendments and presumptions are in favor of the Commission. It will not be presumed a body created by law acted unlawfully—but the presumption is it acted lawfully, and that rates fixed by it are just and reasonable and consequently within its power.

ALLEGATIONS IN THE BILL AS TO THE UNREASONABLE CHARACTER AND EFFECT OF THE RATES FIXED BY THE ORDER.

The bill must be treated as an entirety. The order of the Commission, the Commission law, the tarrifs are all made part of the bill.

By the order it appears after due hearing and investigation certain existing rates were condemned as unjust, unreasonable and discriminatory, and the rates named in the order, fixed and determined to be just, reasonable and non-discriminatory. Moreover, it appears that the entire schedule of rates was not under investigation or affected, but only commodities moving under class rates between Portland and certain points south thereof in Oregon.

The court below (Rec., p. 57) thus summarizes the allegations of the unreasonableness of the rates established by the order and their confiscatory character:

> "It is alleged in general terms that the local rates of the complainant company affected by the order of the Commission were reasonable and just and as low as the situation of the properties and the competitive conditions of the business, both intrastate and interstate, 'will permit or allow, and the said compensation charged upon said existing tariffs is reasonable and just and affords to your orators but slight compensation above the cost of the service'; that the decreases attempted to be made by the Commission involve the class rates referred to and, if enforced, will deprive the complainant of a large sum of annual revenue

and compel it to give the use of its property without reasonable or just compensation, and will compel it to increase other rates upon traffic not affected by the order, and particularly upon products of the soil, forest and farm, many of which receive and enjoy terminal rates, including such commodities to be sold and consumed in the markets of the world, thereby compelling the complainant to discriminate against such last named products, to the great injury of the complainant and of the public; and that the order of the Commission is unreasonable, unjust and arbitrary and, if enforced, will deprive the complainant of earnings which it is entitled to collect and receive, in excess of the revenue that would be derived from the enforcement of the order; and 'that said pretended order is void and of no force and effect in this: that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of your orators, and will deprive your orators of their property without compensation and without due process of law.' These averments are not sufficient to raise an issue. *Central of Ga. R. R. v. McLendon*, 157 Fed. 961. They are but conclusions of law and are not supported by any averment of fact. Indeed, they are inconsistent with the facts alleged."

REDUCTION NOT GREAT.

An examination of the order set out in the record (pp. 17 to 34) will show on its face that radical reductions were not made. On the contrary it was more a lining up of the rates to remove discriminations than anything else. This led to reductions

but not of a radical nature. The court will observe that in but very few instances was the first class rate disturbed and but minor changes were made in a number of cases.

In order to aid the court in checking up the changes, should it deem it material, we submit a table showing rates condemned, rates established and difference between the rates at a number of representative points. Salem, Albany, and Corvallis are all situated on the Willamette river, where the rates are affected by water competitive conditions.

BETWEEN PORTLAND AND SALEM—53 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates	24	21	18	16	14	14	12	9	7	6
New Rates	24	21	18	16	14	14	12	9	7	6
Amount of reduction	--	--	--	--	--	--	--	--	--	--

BETWEEN PORTLAND AND CORVALLIS—89 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates	28	25	22	20	18	17	17	13	11	10
New Rates	28	25	21	19	16	16	14	11	8	7
Amount of reduction	--	--	1	1	2	1	3	2	3	3

BETWEEN PORTLAND AND COTTAGE GROVE—144 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates	54	48	44	41	37	35	28	21	16	13
New Rates	54	46	38	32	27	27	22	16	14	11
Amount of reduction	--	2	6	9	10	8	6	5	2	2

BETWEEN PORTLAND AND ROSEBURG—198 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates	72	64	59	55	50	45	36	25	18	15
New Rates	72	61	50	43	36	36	29	22	18	14
Amount of reduction	--	3	9	12	14	9	7	3	--	1

BETWEEN PORTLAND AND GLENDALE—263 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates	95	83	77	71	64	58	46	29	22	19
New Rates	95	81	67	57	48	48	38	29	22	19
Amount of reduction	--	2	10	14	16	10	8	--	--	--

BETWEEN PORTLAND AND ASHLAND—342 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates	123	107	95	91	82	74	58	34	26	23
New Rates	123	105	86	74	62	62	49	34	26	23
Amount of reduction	---	2	13	17	20	12	9	--	--	--

A reduction in rates does not necessarily decrease earnings.

Willcox v. Cons. Gas. Co., 212 U. S. 19, 51.
Knoxville v. Knoxville Water Co., 212 U. S. 1, 18.
Chic. & G. T. R. Co. v. Wellman, 143 U. S. 339.

VALUE OF PROPERTY ON WHICH RETURN IS CLAIMED.

Fortunately in this there is no involved question of law or fact to discuss. Appellants have set out explicitly the value of the entire property of the railroad on which they assert they are entitled to a return and fix the amount of the return they are entitled to.

They allege (Rec., p. 36) the property is of the reasonable value of a sum representing the outstanding bonds, deficit and capital stock of the company. These sums are stated as follows: (Rec., p. 33)

Preferred stock, par value	$12,000,000.00
Common stock, par value	7,000,000.00
	$19,000,000.00
Bonded indebtedness, par value	17,745,000.00
Deficit (floating indebtedness)	3,207,008.83
Total	$39,952,008.83

We do not discuss the history of the bonds or stock or deficit and but little light is thrown on the details by the bill. It does appear that the $7,000,000 common stock was long ago issued for interest on bonded indebtedness, etc., which had been permitted to default (Rec., pp. 35-36). For the purposes of this presentation it will be assumed the figures as alleged are its value.

At page 36 of the Record, it is alleged that appellants are entitled to earn enough from the properties to pay annual interest on the bonds at 5 per cent, interest upon the unsecured debt (referred to as a "deficit") of 6 per cent, and a dividend of 6 per cent or 7 per cent upon the capital stock. This is the return appellants claim they are entitled to. Any less under their theory would be confiscation *pro tanto*.

It will be noted *the figures represent all the properties of the Oregon & California Railroad Company, not the property devoted to the public use only*—and on *all* of it as represented by the figures they allege they are entitled to the return in question.

Reduced to figures this means appellants are entitled to a net return on the stock as follows:

7 per cent on 12,000,000 preferred capital stock	$840,000
6 per cent on 7,000,000 common capital stock	420,000
	$1,260,000

RECEIPTS AND EXPENDITURES.

On page 36 of the Record will be found a statement showing all receipts and disbursements for the fiscal years ending June 30, 1902, to June 30, 1909—both inclusive. This tabulation in itself absolutely contradicts the allegation of confiscation.

It will be observed no light is thrown by the complaint upon the purpose of the expenditures. Under the terms of the lease (page 34, Rec.) the Southern Pacific Company was obligated "to keep the leased property in good order * * * operate, maintain, *add to and better the same at its own expense*," etc. How much of the "deficit" is for "additions and betterments" and not chargeable to operation is not disclosed. That the account set out on page 36 of the Record represents *all* expenditures is plain. It is perfectly apparent that what appellants are attempting to do, is to require the people of Oregon to pay not only a fair return on the capital invested and the value of the property, but to repay the capital itself, under the guise of expenses, and the table demonstrates this is just

what has been done for a series of years. In other words, instead of paying dividends which might have been paid, they have reinvested the surplus and want the court to allow what might be termed extra dividends.

It affirmatively appears that *every dollar that was expended under the terms of the lease* on the property during the fiscal year ending June 30, 1909, including betterments, taxes, interest, every charge, amounted to *$5,839,698*. The receipts for the same year were *$7,104,081*, a *net return* which could have been applied to dividends of *$1,263,383* —an amount more than equal to that required for dividends as claimed.

THE BILL IS SILENT AS TO RETURNS FOR YEAR 1910.

The bill is silent as to the earnings for the fiscal year ending June 30, 1910. The order attacked was not issued until September 21, 1910, and as the law requires the annual reports of carriers to be filed by September 15th, it is a fair presumption the Commission had the result of the year before them. The bill of complaint was not filed until October 12, 1910.

In the absence of a showing of results for the year then closed, the familiar rule that the pleading is most strongly taken against the pleader has particular force. The facts were peculiarly within the knowledge of the appellants and their failure to allege revenue, expenses, and earnings for the year 1910 is tantamount to a confession that, if shown,

they would negative the allegation of confiscation. The year was closed, and the court was entitled to have the year's business before it; and appellants no more met the duty to disclose current returns by showing 1909 business than if they had shown results for any other previous and more remote period of time. It might have been admitted that business was unremunerative in 1905 or 1909. *Cui bono?* How about 1910? The burden is on appellants—certainly not on the court or the state of Oregon.

The allegations that in the past appellants' earnings have been small and their business unremunerative do not and cannot affect this order.

There may be reasons for this for which the public is no wise responsible, as well as compensation in other possible directions therefor; and the public certainly does not guarantee that every investment made by a railroad shall be profitable.

Mathews v. Board of Corp. Com., 106 Fed. 7, 9, 10.

Steenerson v. Great Northern R. Co., 69 Minn. 353.

It is sufficient to say the Commission must make its orders under existing conditions. The question presented to the Commission is, are the rates complained of unjust and unreasonable *now*, not twenty years ago; are the rates prescribed confiscatory *now*, not, would they have been five, ten or twenty years ago.

RETURN ALLOWED.

The courts in a number of cases have determined as to the particular matter before them what would constitute a reasonable return, but more often they have declined to interfere with the rates fixed where it was alleged the return would be reasonably low.

As was held in *Willcox v. Consolidated Gas Co.*, 212 U. S., 19, 50, there is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. This depends upon circumstances, risk, usual return, etc.

On value of property and a reasonable return we refer also to

San Diego Land Co. v. Nat'l City, 174 U. S. 739, 757.

Under any circumstances the return allowed is only on the property devoted to the public use.

The rapid increase in earnings appears on the face of the bill and shows them to be constant, resulting from the gradual growth and development of the country.

ALLEGED LOSS OF REVENUE UNDER THE ORDER.

There are some errors in the bill as to the alleged loss occurring through repetition and duplication of figures, which were admitted by complainants (appellants) in argument below.

At page 37 of the Record, the loss under the order on intrastate business is estimated at $120,859.32 and on interstate business of $156,072.48, a total of $276,931.80.

In the brief filed by complainants in the court below it is admitted "this aggregate thus alleged is an erroneous footing as the volume of interstate business is included in the preceding figures."

In other words the total estimated loss was *$156,072.48*, not *$276,931.80*. The total estimated loss is set out at the first named sum in the assignment of errors (Rec., p. 62).

It will be accepted by any one familiar with bills of this character, that the estimate is never understated.

But this is not all: with that careless disregard for figures shown in this class of cases, and notwithstanding the admitted error in the statement of the loss in paragraph X (Rec., p. 37), the alleged loss is still further exaggerated in paragraph XIV (Rec., p. 43), where it is alleged the property will be confiscated "to the use of the public *in excess of about $300,000* per annum," which allegation is later substantially repeated (Rec., p. 44).

Yet appellants argue that such statements as these in the same complaint are admitted by demurrer as true facts and present an issue to be tried. What is there to be tried? Admitting the loss shown, there is no confiscation, unless counsel mean, which they probably do, that any reduction in rates is *pro tanto* confiscatory.

Admitting that the difference in revenue directly and indirectly under the rates proposed will be $156,072, as stated in the assignment of errors, or $300,000 as finally swollen toward the end of the bill, and waiving the fact that much of the "expenses" is for additions and betterments made under the authority of the lease pleaded, what does it prove? As found by the court below, the bill shows there would still be left a handsome return on the investment.

Is there anything in these various statements that would justify a court in finding that the rates fixed by the Commission are unreasonably low or confiscatory or would warrant continuing in effect a discriminatory tariff?

Appellants do not contend they could show greater losses than the amount they allege and admit, $156,072, which is probably grossly excessive. This being true, what purpose would be served by trial? If tried, what further light could be cast on the subject?

The weakness of the claim of confiscation is further demonstrated when the earnings as shown by the bill are considered in connection with alleged shrinkage in the revenue.

Under the facts one need not be surprised at the statement of the court below in referring to the allegations of confiscation (Rec., p. 58):

> "Indeed they are inconsistent with the facts alleged."

And again (Rec., p. 58):

> "On this showing, it certainly cannot be consistently said that the earnings of the complainant, even after making the deductions alleged to be caused by the order complained of 'will afford but slight compensation above the cost of service,' or that the order of the Commission is confiscatory, or, in advance of actual experience, that the rates fixed by the Commission will not afford a fair return upon the value of the property."

Assuming that the reduction in rates results in reduction of revenues to the extent asserted by the bill, it neither shows confiscation, nor that the rates fixed are unreasonable, nor that the order is a direct interference with interstate commerce.

The alleged loss in revenue on interstate rates is but the indirect result of the proper exercise of a purely state power.

Such a loss is the same in principle as "would be a loss or expense resulting from a due exercise of the necessarily recognized police power residing in the state."

With reference to the intrastate business it is significant that although the state and interstate receipts are stated with care and detail, there is no allegation what the expenses of conducting state and interstate business may be. Tested by demurrer, the failure to make such a showing is to be construed most strongly against the pleader. "In other words, the pleader is not willing to negative the fact of reasonableness that attends the order by legal presumption." There is nothing in the bill to

show the value of the property for state uses and for interstate uses. Manifestly the carrier is not entitled to a return on the value of the property as a whole from state business and also a like return from interstate business. The property as a unit has one value, which in any consideration of the question of confiscation is to be divided equitably into the value of the property for the interstate use to which it is put, and the state use. No such allegation is made. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 175. Not only is there nothing to show the cost of doing the state business, but there is nothing to show the amount of the business taking class rates affected by the order, or the actual or relative cost of doing that business.

On this subject at page 58 of the Record, the court below says:

> "Again the complainant does not state the amount of intrastate traffic which will be affected by the order, nor the cost of service, nor the value of the property devoted to such business. It sets out the value of the entire property, the gross receipts and disbursements for both state and interstate business for a number of years prior to the date of the order, the amounts received from state and interstate business, freight and passenger, during the year 1909, and approximate percentage of tonnage affected by the order sought to be enjoined, assuming, as I take it, that both local and interstate traffic are affected by such order. There is no allegation as to the cost of conducting state business as distinguished from interstate business, and no statement of the difference between passenger and freight expenses."

Further, the alleged loss is only an estimate, not founded on any experience gained by putting the rates into effect. Nor is it certain, either as a matter of fact or of law, that the re-alignment of the appellants' rates on a proper and justifiable basis to avoid the discriminations between places and commodities found in the old tariff, will in any wise diminish the income received by the complainants. If there is any presumption which the law invokes on such a subject, and which common sense and all human experience would suggest, it is that the making of reasonable, relatively just rates in place of unreasonable and unjustly discriminatory rates would result in a greater prosperity for the communities served which would speedily reflect itself in the railroad's earnings. Carriers necessarily and justly participate in the prosperity of their patrons in the resultant enlargement of their own business. *Central Yellow Pine Assn. v. Illinois C. R. Co.*, 10 I. C. C. Rep. 505.

ALLEGATIONS THAT RATE IS UNREASONABLE AND IF ENFORCED WILL RESULT IN LARGE LOSS OF REVENUE NOT ADMITTED BY DEMURRER.

Reagan v. Farmers' Loan & T. Co., 154 U. S. 401.

Central of Ga. R. Co. v. McLendon, 157 Fed. 961, 977.

Missouri Pacific R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348.

Southern Pacific Co. v. Interstate Commerce Commission, 177 Fed. 963.

"What is averred here as to the deprivation of property, and the future operations of the road at a loss, are mere conclusions as to supposed effects. *It does not amount to an allegation of facts.* It is the mere statement of a conclusion that the road would be operated at a loss because plaintiff would be compelled by the statute to enter into involuntary, unreasonable and unprofitable contracts. The allegation in question is, indeed, a conclusion based upon another conclusion as to the supposed operation of the statute."

B. C. R. & N. Ry Co. v. Dey, 82 Iowa, 312-343.

In the *Knoxville Water Company* case, *supra*, the court says it will not base its decision on speculation as to the effect of the rate, based on the operations of a prior fiscal year.

See also

Quimby v. Clyde S. S. Co., 12 I. C. C. Rep. 392, 396.

Brewer v. Louisville & N. R. Co., 7 I. C. C. Rep. 227, 238.

Central of Ga. R. Co. v. McLendon, 157 Fed. 961, 978.

THERE CAN BE BUT ONE TEST AS TO WHETHER RATES ARE CONFISCATORY —A REASONABLE, ACTUAL TRIAL.

In the absence of such a showing of actual test, the confiscatory nature of the rates must be shown beyond a reasonable doubt. Not only does it appear that there is no claim of anything except a *pro tanto* confiscation on an admittedly small proportion of the company's business, but the essential ele-

ments to show whether under the new rates the company will be carrying the traffic moving under the rates affected at a loss or profit are entirely wanting.

Ex parte Young, 209 U. S. 123.
Knoxville Water and *Consolidated Gas* cases, *supra*.

CONFISCATION CANNOT BE PREDICATED OF A SINGLE RATE OR GROUP OF RATES, BUT MUST BE JUDGED FROM THE EFFECT ON THE ENTIRE BUSINESS DONE WITHIN THE STATE.

The *pro tanto* confiscation theory has not received judicial approval. This is so, because such a theory would result in compelling a commission, before it could make or enforce an order, to determine accurately the exact cost of carrying each particular commodity and the exact return thereon, with the unsound implication that every rate must bear its fixed percentage of cost and pay a given profit.

The principle enunciated in the heading above has received the highest judicial approval.

Willcox v. Consol. Gas Co., 212 U. S. 19.
Atlantic Coast Line v. North Carolina Corp. Comm., 206 U. S. 1.
Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257.
St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649, 665.
Southern Railway Co. v. Atlanta Stove Co., 128 Ga. 207, 233, 234.

Wisconsin, etc., R. Co. v. Jacobson, 71 Minn. 519, s. c. 179 U. S. 287, 302.
State v. Missouri Pac. R. C., 76 Kans. 467.
Pensacola, etc., R. Co. v. Florida, 25 Fla. 310.
Morgan's R. R. Co. v. R. R. Comm, 109 La. 247.
People v. Railroad Co., 176 Ill. 512.
Chicago Union Traction Co. v. Chicago, 199 Ill. 579.

In deciding whether rates fixed under the legislative authority violate the fourteenth amendment, the Supreme Court does not rest its judgment on one set of rates for specific articles, but takes into consideration all the rates on all articles, and decides whether, as a whole, the result is unreasonable.

Smyth v. Ames, 171 U. S. 361.

In the case of the *Southern Ry. Co. v. Atlanta Stove Co.*, 128 Ga. 207, 233, 234, it was averred that the rates prescribed were unreasonable; that the amount earned in the transportation of the articles covered by the circular, between the points therein prescribed, would be less than the cost of service, and the effect of the enforcement of the rate would be to take property without due process of law, denying complainant the equal right and protection of the law, contrary to section 1, article XIV, of the amendments to the Constitution of the United States.

The court upheld the order of the commission, citing the case of *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, and also *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, and said:

> "The commission fixes a schedule of rates, some commodity rates which are higher than others, and necessarily so. The entire body of rates are prescribed with respect to their interrelation. The low rate is presumably fixed with reference to the higher rate, and conversely; and a particular rate cannot be said to be unreasonable without showing it to be such when taken in connection with the whole body of rates."

The Georgia court then held that the averment that the rates between the points therein prescribed would be less than the cost of service, did not raise an issue of fact,

> "since conceding the truth of the averment for the reasons given above, the rate therein prescribed is not alleged to be unreasonable as a part of the whole body of rates prescribed by the commission."

Not only is the rule against the *pro tanto* theory, but the absence of a return in the schedule as a whole is not always to be taken as rendering the legislative act fixing rates unconstitutional. The reasonable worth of the service is the utmost the public can be expected to pay.

Reagan v. Farmers' L. & T. Co., 154 U. S. 412.
Symth v. Ames, 169 U. S. 466, 544, 547.
San Diego Land Co. v. National City, 174 U. S. 739.
Covington & Lex. Turnpike R. Co. v. Sandford, 164 U. S. 578, 596, 597.
Jerome Hill Cotton Co. v. M. K. & T. Ry. Co., 6 I. C. C. Rep. 601.
Southern Pac. Co. v. Bartine, 170 Fed. 725.

In *Noyes, Amer. R. R. Rates*, at page 25, the author says:

> "But all this (the fair return on the value of the property devoted to the public use) has very little to do with particular charges. The value of the railroad property is only important in determining the reasonableness of an entire schedule of rates, an inquiry which can hardly arise except when a law-made tariff is attacked as being confiscatory and, therefore, unconstitutional. The value of the property is a most remote consideration in fixing an individual rate. While each shipment should undoubtedly produce its X-millionth part of the revenue required from all shipments, X is an unknowable quantity. It would be impossible to fix even the maximum of individual rates in any such way. In the long run the schedule should bring in a fair return upon capital invested, but the necessity for such return has practically no effect upon the charge for the particular service. We must look for other factors to determine the individual charge.

UNJUST DISCRIMINATION.

By the railroad commission act, the legislature has prohibited unjust discrimination, as against persons, localities, and particular descriptions of traffic, as it has also prohibited the imposition of unjust and unreasonable rates.

The reasonableness of a rate is one thing; whether it is unjustly discriminatory is another. Reasonable charges may constitute an unjust discrimination or create an unlawful preference. If rates are unjustly

discriminatory, they are forbidden by law, although in and of themselves they may be reasonable. Every deviation for equality, for which there is no specific warrant in law shown, is an unjust discrimination.

Beale & Wyman, R. R. Rate Regulation, Sec. 724, 839.

Portland R. L. & P. Co. v. Railroad Commission of Oregon, 105 Pac. 709, 715; 109 Pac. 273.

Interstate Com. Comm. v. Cinn., etc., Ry. Co., 167 U. S. 479, 511.

Kinnavey v. T. Ry. Assn., 81 Fed. 802, 804.

Board of Trade v. Ry. Co., 6 I. C. C. Rep. 632, 645.

In *Portland R. L. & P. Co. v. Railroad Comm. of Oregon*, 56 Or. 468, at page 484, the court said:

> "It is not necessary, therefore, that the rate charged should be unreasonable, for if it is unjustly discriminatory, it is sufficient to authorize a regulation thereof."

In *Portland R. L. & P. Co. v. Railroad Comm. of Oregon*. 109 Pac., at page 274, the court said:

> "But it was stated in immediate connection with that remark [i. e., that the rates condemned by the Commission were in fact not unreasonable as compared with charges of other railways] that the law authorizes an investigation upon a complaint as to a charge, which is in any respect 'unreasonable or unjustly discriminatory,' 'The fact that a rate is *per se* reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on Railroad Regulation, at section 839. 'If rates are relatively unjust, so that

undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness *per se* of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable. Beale & Wyman, Sec. 838."

Citations might be multiplied indefinitely, but there is no question as to the law. The construction placed on the Oregon Commission act by the state Supreme Court in this regard is, of course, binding on this court.

There is nothing more abhorrent to a court of equity than an unjust discrimination. "Equality is equity." The effect of past discriminations, secret and open, has been intolerable; monopolies have been fostered, competition stifled, and communities dwarfed. The grosser forms of discrimination, such as open rebating, have been extirpated, but as said by the Interstate Commerce Commission (report for 1910), the fight against discriminations is not yet won. They still exist, often in forms so secret that they are known only by their results. The state

not only has the power, but it is its duty, as the fountain-head of justice and the guardian of the public interest, to use, if need be, the sternest measures to secure uniformity and equality of treatment of its citizens, individually and collectively, and of their products, by transportation companies exercising the high attributes of sovereignty itself.

FINDINGS OF COMMISSION.

In the case before the Commission, the following findings were made (Rec., p. 16), after setting out in paragraph 3 certain existing rates:

> "4. That the above enumerated class rates are and each of them is unjust, unreasonable, and excessive. * * *
>
> "5. That the aforesaid class rates are not arranged upon any uniform or approximately uniform relationship as to each other, and that in consequence thereof the aforesaid rates are unjustly discriminatory as against the several stations and localities above enumerated, and are unjustly discriminatory as between the various classes of commodities taking class rates according to the said Western Classification No. 48.
>
> "6. That just and reasonable and non-discriminatory charges for said Southern Pacific Company to charge, collect, and impose in the future in lieu of those hereinafter [Note: error; original order says *hereinbefore*] found to be unjust and unreasonable, are the following" (Setting out new rates).

Then follows the order to cease and desist charging the rates set out in paragraph 3 and the mandate to substitute the rates set out in paragraph 6.

It will be seen the Commission (1) found the existing rates unjust and unreasonable, and (2) found the existing rates were unjustly discriminatory, and (3) found rates which were just and reasonable, and non-discriminatory. These latter rates are the ones which were ordered put in effect.

Either the finding of the unreasonableness of the existing rates, or their unjustly discriminatory character, was sufficient under the Oregon statute to support the order. It was not necessary that both facts should be found; either was itself a sufficient ground for condemnation of the existing rates and the substitution of other rates not subject to the same objection.

The whole bill of complaint is addressed to the question of the reasonableness of the rates and constitutional questions. There is not a word in it which either attacks the finding of the Commission as to the unjustly discriminatory character of the old rates, or seeks to explain or justify the wide divergences which appear on the face of the old tariff, and which themselves raise a presumption of unjust discrimination. So far as this bill is concerned, the findings of the Commission on that point are not only unchallenged by appellants, but the Commission's finding is shown to be right by an examination of the rates set out in paragraph 3 of the order itself. Everything contended by appellants in their bill could be conceded, and yet the Commission's order would be supported because it has the support of the law in condemnation of unjust

discriminations. Without an explanation of these obvious discriminations, and with the Commission's findings unchallenged, the bill is without equity.

DISCRIMINATION APPEARS ON THE FACE OF THE BILL.

In order that the court may see the basis of the finding of the Commission as to the discrimination found to exist in the tariffs complained of, we submit the following statement:

Section 20 of the act provides, "There shall be but one classification of freight in the state which shall be uniform on all railroads."

The purpose of this is to prevent undue discrimination and promote commerce and simplify tariffs. Under section 28, the Commission is given power to investigate classifications as well as other matters which may be complained of.

The court will probably take judicial notice of the fact of common knowledge that the freight classification known as the "Western Classification" is in force on all roads west of the Missouri river, including complainants. At any rate, from the order it appears the "Western Classification" is in effect in Oregon and from the tariffs has been adopted by the appellants. This classification was prepared by all the railroads interested, is revised frequently and represents their best judgment as to the different classes in which the various commodities belong. It divides all freight into ten classes, numbered 1 to 5 and lettered A to E; every commodity is located in one of these classes; in classifying

a commodity its character, value, weight, bulk, and many other things are considered in determining which class it takes, the first class includes those articles which should take the higher rate. The classification thus fixes the relation of one commodity to the other and the proportion of the total transportation revenue each should bear, and that is its purpose.

In order to prevent unjust discrimination after the commodities are thus classified a suitable relation of charges for the various classes one with the other must be maintained; otherwise the classification would serve no useful purpose. In the Pacific Northwest this is done by the use of the scale of percentages set out on page 46 (par. k) of the Record.

It is a matter of common knowledge that through the manipulation of the classification and improper spread between the classes much undue discrimination has been practiced. Hence the law provides there can be but one classification and commissions have established and enforced official scales definitely fixing the relationship of charges between the classes. The rates formerly in effect over the lines of the complainants furnish an excellent illustration of discrimination by reason of the maintenance of an excessively high relationship of the middle classes to first class, or to put it in another way, excessively high rates on the lower classes.

SCALE ADOPTED.

An examination of the rates in effect as shown by the Record (pp. 7 to 13) discloses appellants had established no fixed relation between the rates charged as between the different classes. It varied greatly every few miles, and for that no explanation is apparent or has been offered. Whether intentional or not, unjust discrimination inevitably resulted from operation of the tariff, as will hereafter be shown.

The bill alleged (par. XV, p. 46, Record) that the order is void because it is based on an arbitrary approval of the first class rates and the fixing of an arbitrary spread between the classes as follows:

Class	1	2	3	4	5	A	B	C	D	E
Per cent	100	85	70	60	50	50	40	30	25	20

In other words, instead of the fourth class rate being from 50 to 78 per cent of the first class rate as heretofore charged by appellants it is fixed on a basis of 60 per cent thereof.

It is alleged the scale was adopted arbitrarily, without reference to the distance the traffic moves, the character or nature of the traffic, the service performed, or the compensation to be paid therefor, and the classification is capricious and not based upon any fair consideration, that under the spread fixed the largest reduction is effective at points on the line most difficult and expensive to operate.

Here again is an allegation the pertinency of which it is difficult to see. As to the spread between the classes being arbitrary and capricious it

might be suggested it is the official scale, and as shown by the tariffs on file, the one generally adopted and used by all the railroads in this section.

Some such argument was presented to the court consisting of Judges Gilbert, Ross and Morrow in the case of *Southern Pacific Co. v. Interstate Commerce Commission*, No. 15250, in the Circuit Court of the United States, ninth judicial circuit, northern district of California. The answer of the court in opinion filed but not reported was as follows:

> "It is said again that the rates were fixed arbitrarily, that there was a general readjustment of rates, a comprehensive and radical change of rates. Every establishment of a rate must be in a sense arbitrary; but if it is arbitrary in the sense that it is violative of the law, or disregards the equities of the parties or is an abuse of discretion, those are grounds for setting it aside. But there are no such grounds presented in these bills. * * *"

And again:

> "the mere fact that the readjustment is comprehensive and radical is no ground for setting it aside; the situation may have called for a comprehensive reduction. * * *"

And again:

> "taking the bills as they are, they fail to make a case which would justify this court in substituting its judgment if it had a different judgment, from that of the Interstate Commerce Commission and enjoining even temporarily the rates which they have established."

THE OREGON SCALE GENERALLY IN USE IN THE NORTHWEST.

No argument is necessary to show how a first class rate might be entirely reasonable and by the manipulation of the scale the commodities moving under the lower classes taxed excessive and unjustly discriminatory rates. To guard against this is the purpose of the classification and the scale or relationship of the rates, and the failure to observe these necessary purposes is a vice of the tariff under review.

We assume we have the right to refer to the public records of the state of Washington as to the official scale adopted in that state by order of the Railroad Commission of Washington, September 13, 1906. Under this order the relation which each class should bear to the other, was fixed on exactly the same scale as that fixed in this case by the Oregon Commission, and has never been changed.

As indicating the universality of the use of the scale adopted in this section and its approval by the Interstate Commerce Commission, we refer to certain decisions made by them covering movements under class rates west of the Rocky Mountains and the Missouri river.

In the cases of *Portland Chamber of Commerce v. Oregon R. & N. Co. et al., Transportation Bureau of Seattle Chamber of Commerce et al. v. N. P. Ry. Co. et al.*, 21 I. C. C. Rep. 640, involving movement of traffic under class rates out of Portland, Seattle and Tacoma in Oregon, Washington, Montana, Idaho and Utah over roads terminating in said

cities, the commission found a reduction justified and named reasonable rates. The relation between the class is precisely the same scale which was employed in the case at bar.

In the case of *City of Spokane et al. v. Northern Pacific Railway Co. et al.*, 15 I. C. C. Rep. 376, the Interstate Commerce Commission established reasonable class rates from St. Paul to Spokane. The relationship between the rates varies but slightly from the Oregon and Washington official scale.

In *Traffic Bureau of The Merchants Exchange v. Southern Pacific Company*, 19 I. C. C. Rep. 259, class rates from Sacramento to points in Nevada involving the crossing of the Sierra Nevada mountains were under review.

Here again the relationship between the classes is substantially the same as fixed by the Oregon Commission.

In the case of *Commercial Club of Salt Lake v. A. T. & S. F. Ry. Co.*, 19 I. C. C. Rep. 218, rates were prescribed by the Interstate Commerce Commission to Salt Lake from Omaha upon substantially the following scale:

Class	1	2	3	4	5	A	B	C	D	E
Per cent of 1st class prescribed	100	86	72	59	49	49	39	35	25¼	21¼
Oregon-Washington official scale	100	85	70	60	50	50	40	30	25	20

Indeed, an examination of any of the distance or class rate tariffs used in Oregon or Washington except that of appellants will show instantly the action of the Commission could not possibly be characterized as arbitrary. On the contrary one

must conclude that the burden was on appellants to justify the abnormal and varying scale in use by them. No such explanation or justification was offered.

RELATIONSHIPS CONDEMNED AS CREATING DISCRIMINATIONS.

Perhaps the best way to show the effect of the relationship condemned is to submit a table of representative points and the percentage relationship of the rates between the various points as shown by the rates condemned (Rec., 7 to 15).

Scale of rates as fixed by Railroad Commission, known as official scale, compared with scales as shown at a number of representative points on Southern Pacific lines in Oregon:

Less Carload Classes Official Scale	1 100%	2 85%	3 70%	4 60%
Miles between Portland and				
24 Canby	100	88.3	66.7	50
53 Salem	100	87.5	75	66.7
80 Albany	100	89.3	78.6	71.4
123 Eugene	100	91.3	84.8	78.2
198 Roseburg	100	88.9	82	76.4
249 West Fork	100	87.8	80	75.6
297 Grants Pass	100	86.9	80.4	74.8
342 Ashland	100	87	80.4	74
86 Lowson	100	90.6	81.2	78.1
100 Twin Buttes	100	92.5	82.5	75

Carload Classes Official Scale	5 50%	A 50%	B 40%	C 30%	D 25%	E 20%
Miles between Portland and						
24 Canby	44.4	44.4	44.4	33.3	27.8	22.3
53 Salem	58.4	58.4	50	37.5	29.3	25
80 Albany	64.3	60.7	60.7	46.4	39.3	35.7
123 Eugene	71.7	67.4	54.4	43.5	32.6	26.1
198 Roseburg	69.4	62.5	50	34.7	25	20.8
249 West Fork	67.8	62.2	48.9	31.1	23.3	20
297 Grants Pass	67.3	60.7	47.7	29	21.5	18.7
342 Ashland	66.6	60.2	47.2	27.6	20.2	17.8
86 Lowson	71.8	71.8	59.4	50	34.4	31.2
100 Twin Buttes	70	67.5	52.5	45	32.5	26.5

The irregularity of the scale is apparent and after reaching Eugene the extremely high percentage the third, fourth and fifth classes bear to the first class as compared with the official scale is equally apparent.

ARBITRARINESS OF THE ORDER.

This has been referred to under the caption "Scale Adopted." This allegation is set out in paragraph XV (*k*) of the bill (p. 46, Rec.) and is as follows:

> "And your orators allege and show the said order of the said Railroad Commission of Oregon is void and of no force and effect in this: * * *
>
> (*k*) "Said order is void and of no force and effect in this: That the pretended reduction of said class rates is based upon the arbitrary approval of Class 1 now in effect by your orator Southern Pacific Company, and an arbitrary spread between said class rates, adopting the arbitraries of 10 per cent for first class, 85 per cent of first class for second class, [here follow other percentages of official scale] * * * which said arbitrary classification and spread, and each thereof, was adopted by the said Railroad Commission in making said pretended order, and was so adopted arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and said classification is capricious and not based upon any fair consideration.

"And your orators further show that under said arbitrary spread, or the application of said percentage to said class rates, the largest reduction is effective at points on said lines more difficult and expensive to operate by reason of mountain chains and physical difficulties."

This is a mere statement of a conclusion of law and not of fact. There is nothing to show that the relationship between the various classes *established by the Southern Pacific Company itself* was made with reference to the distance the traffic should be moved, and the character and nature of the traffic and the service performed, and the considerations upon which the same is based; and the averment that the largest reduction is made at points where the line is most expensive to operate by reason of mountain chains and physical difficulties is entirely irrelevant. The allegation is not sufficient to overcome the presumption that the adoption of the uniform percentage scale was not arbitrary, but on the contrary was reasonable.

Moreover, the allegation that the Commission adopted the scale without regard to distance, value of service or with respect to the character of the country is refuted by the bill.

The bill alleges the Commission made no substantial change in the first class rate. This is true. Therefore if the first class rate already in effect was made with these considerations in mind (and there is no allegation to the contrary), it is not subject to complaint. From the bill it appears both

by direct allegation and the order which is set out in full, the Commission found by applying the official scale reasonable and non-discriminatory rates would result.

It necessarily follows, therefore, that every factor counsel contends was not considered, must have been considered, as mathematically it could not be otherwise.

Distance was considered, as shown by the tables set out in the complaint.

As illustrative, take the fourth class rate as fixed by the order.

Distance from Portland.	*Station.*	*Rate in Cents.*
123 miles	Eugene	28
198 miles	Roseburg	43
263 miles	Glendale	57
297 miles	Grants Pass	64
329 miles	Medford	71
342 miles	Ashland	74

The rate gradually advances with the distance.

The classification was unchanged. The very basis on which the classification is prepared takes into account the character, nature and value of the traffic. It stands as adopted and in use by appellants. Therefore when it is alleged the character or nature of the traffic was not considered, on its face the allegation is not the fact.

Appellants state without explanation the largest reductions are made to points on the line most difficult to operate. Whether this refers to the spread or to the rate cannot be determined. In either event

the allegation is baseless unless it may happen that at some point which counsel has in mind appellants may have maintained some particularly high rate, in which event it would be the duty of the Commission to make the greatest reduction at such point. The rates established as shown by the bill gradually increase with the distance and use appellants' own first class rate and classification as a base—and the same scale is used throughout.

There was a similar allegation in the bill of *O. R. & N. Co. v. Campbell*, 173 Fed. 957, 991, decided by the Circuit Court below. There the allegation was:

> "It is a fact that such attempted adjustment, (i. e., giving branch line points the same relative rates as main line points, on the scale adopted in the case at bar) is arbitrary and unreasonable, and is founded upon no circumstance and condition affecting the cost of service to your orator or the value of the service to the public, and is unjust to your orator."

This, the Circuit Court said, was merely argumentative.

> "But the fault of the bill is that no facts are stated as to the cost of service, or in any way indicating what it is worth to transport freight over the lines of the complainant between the points designated, and the court is, therefore, unable to say from the bill that the rate fixed by the Commission is unreasonably low. Especially are these and similar averments insufficient, when read in view of the particular theory upon which the suit is instituted."

The court will take judicial knowledge of the fact that Eugene is in the Willamette valley, a very level, one might say, flat country; that Roseburg is in a more mountainous section and to reach Grants Pass grades are quite heavy and the country more mountainous than the Roseburg section. Yet to Eugene the appellants' tariffs condemned by the order named a second class rate which was 91 per cent of the first, the third 85 per cent, the fourth 78 per cent, the fifth 71 per cent. At Roseburg the relationship on the same classes was 89 per cent, 82 per cent, 76 per cent, 69 per cent. At Grants Pass, 87 per cent, 80 per cent, 75 per cent, 67 per cent. The bill itself proves conclusively the rates on the second to fifth classes were relatively lower after leaving Eugene going south, than they are at Eugene and negatives beyond question the allegation under consideration. As the first class rate is substantially unchanged throughtout, it is apparent the scale fixed by the Commission which operates regularly throughout results in fairer rates to appellants than the rate formerly in effect.

Beyond question the unjust discrimination as found by the Commission existed. It appears on the face of the bill. It cannot be denied or explained, and a consideration of the allegation attempting to create this issue but emphasizes the fact.

COMMODITIES PRINCIPALLY AFFECTED.

Appellants allege in substance that the greatest decrease in the rates affects classes 4 and 5; that under these classes staples, and particularly groceries and hardware move; that the decrease will largely benefit jobbers and dealers "in said commodities" who "during several years last past have made and are now making large and excessive profits under said class rates and that the pretended order if put into effect will still further increase the profits of said dealers and jobbers at the expense of your orators and of the public at large." (Par. 10, p. 37 Rec.)

What possible weight can be attached to such allegations as these? Admit them all as facts, and they do not tend to show the rates fixed by the Commission are unreasonable or confiscatory, or that the former rates were not unjust and discriminatory. Taken in connection with other allegations and legal presumptions, the allegations condemn the bill instead of supporting it.

They allege there is a large movement of staples such as groceries and hardware under classes 4 and 5. An examination of the tariff set out in the complaint shows that the difference heretofore existing between these classes and first class, where the character of commodities moving under first class rates is considered, was not very great. In other words from Eugene to Ashland the fourth class rate was from 74 to 78 per cent of the first class rate. Even if tariffs on file in this cause

did not show the fact, or if the court could not take judicial notice of the official scale in the Pacific Northwest, one's own general knowledge would lead to the conclusion that such a percentage of the first class rate for carrying staple and heavy commodities like groceries and hardware as compared with high grade and much lighter goods such as clothing, dry goods, etc., taking first class rates would be very high and unjustly discriminatory. We say this would be the presumption—and this presumption is entirely justified by the tariffs of appellants.

This allegation, therefore, taken in connection with other parts of the complaint, instead of being an argument against the validity of the order, tends to show that complainants have been charging extortionate and discriminatory rates on these heavy staple goods of common use—because they could.

It is difficult to see the purpose of the allegations respecting the profits jobbers and dealers in groceries and hardware are alleged to have been making. If this allegation requires any answer we submit:

1. The dealers and jobbers do not pay the freight, *but the consumer does.*

2. The test of the reasonableness of a rate is not the amount of profit in the business of a shipper, but whether the rate yields a reasonable compensation for the service rendered.

Smyth v. Ames, 169 U. S. 466.
C. & N. W. R. R. Co. v. Osborne, 52 Fed. 914.

Tift v. Southern Ry. Co., 138 Fed. 753, s. c., 10 I. C. C. Rep. 54.

Cent. Yel. Pine Assn. v. Ill. Cent. R. R. Co., 10 I. C. C. Rep. 505.

PRESUMPTION THE RATES WERE NOT FIXED ARBITRARILY.

Section 31 of the act provides:

> "All rates, fares, classifications and joint rates fixed by the Commission shall be in force and shall be *prima facie* lawful, and all regulations, practices and services prescribed by the Commission shall be in force and shall be *prima facie* reasonable until finally found otherwise in an action brought for that purpose pursuant to the provisions of sections 32, 33, 34 and 35 of this act."

Under a clause substantially similar to this, in the case of *Atlantic Coast Line v. Florida*, 203 U. S. 256, the Supreme Court upheld a similar provision of the law, and in discussing the question, said: "We start, therefore, with the presumption in favor of the order." See also

Steenerson v. Great Northern R. Co., 69 Minn. 353.

Interstate Com. Comm. v. Louisville & N. R. Co., 118 Fed. 616.

Same v. Same, 102 Fed. 709.

The averments of the bill cannot override the formal decision of the Commission on a question of fact. The decision of the Commission is entitled to respect and consideration, and, to say the least, its

findings and decisions on questions of fact should be treated as *prima facie* correct.

Cumberland, etc., Co. v. Railroad Commission, 156 Fed. 834, 837.

In the same case on appeal, the court examined the proofs which were before the commission, and upon which the order fixing rates had been made. The court said:

> "Now it may be true that all these returns did not contain all the data upon which a very close and accurate judgment could be based as to the rates that ought to be charged by complainant, under all the circumstances. This is only saying the order may have been erroneous or based upon insufficient evidence, which is no more than saying that, upon investigation, the commission may have come to a mistaken conclusion by reason of erroneous inferences from the evidence furnished by complainant's own returns; but that is far from showing that the commission had, by a merely arbitrary order, promulgated certain rates without making the slightest effort to obtain any knowledge whatever upon the subject. It did not lose jurisdiction by reason of the mistakes it may have made, and, as a result, the rates adopted were not merely arbitrary conjectures, but based on reasons which, while they may have been insufficient, cannot be described as resulting in a decision wholly without evidence to support it. The rates, therefore, promulgated, must be regarded as *prima facie* fair and valid, or, in other words, the *onus* was upon complainant to show that they were what it asserts, confiscatory or unreasonable."
>
> *Railroad Commission v. Cumberland, etc., Co.*, 212 U. S. 414, 422.

In *Southern Pacific Co. v. Interstate Commerce Commission* (No. 15250), in the Northern District of California, before Judges Gilbert, Ross and Morrow, on November 23, 1910, in opinion filed but not reported, the court said:

> "This case comes here from the decision of the Interstate Commerce Commission. It is not denied that the Commission had jurisdiction and that it heard the case; that there was a hearing. The presumption must be that that hearing covered all questions that were involved and that the conclusion of the Commission must be sustained as reasonable."

It appears from the bill herein that the relationships between the various classes, as fixed by the Southern Pacific Company prior to the order, were widely divergent at various stations, even at nearby stations upon the same line, or parallel lines. In the absence of explanation (*which is not given*), it must be taken that the schedule of rates exacted when the order was made was itself arbitrary and capricious, and if there are any circumstances or conditions which warrant deviation from the statutory rule for one uniform classification of freight, the appellants do not now offer them. On the contrary, appellants are in court complaining (par. XV-(k) of bill, Rec. 46) because the Commission prescribed rates which were based on an uniform scale.

Appellants ask the court to take judicial notice of certain tariffs which have been filed with the Interstate Commerce Commission and which are

by reference made part of the bill, on the theory that tariffs filed with that body become part of the law of the land. If this court can take judicial notice of tariffs filed with the Interstate Commerce Commission, then the court may take judicial notice of the fact that the local class rates out of Seattle, Tacoma, and Portland on the Great Northern, Northern Pacific and O.-W. R. & N. Co. are all constructed on the same scale of percentage relations as that which the complainants now say is arbitrary and capricious and not founded on any circumstances or consideration of traffic conditions. The court must also judicially notice that the distance tariffs of the three lines mentioned, and also the Chicago Milwaukee & Puget Sound, applicable in the Pacific Northwest, are all based on the same percentage scale as that characterized by complainants as arbitrary. The court must also notice that the Oregon Short Line Railroad distributive and distance tariffs are with a trifling exception the same as that prescribed by the Oregon Commission, and that the Interstate Commerce Commission in the cases heretofore referred to has adopted precisely the same scale.

With these facts before the court, and it appearing that there was a hearing before the Commission to which no other exception is taken, with appellants' own tariffs showing inexplicable discrepancies and inequalities, how can it be maintained by such averments that the action of the Commission in prescribing an uniform scale of rates is so arbitrary and capricious as to shock the conscience of the chancellor?

Arbitrariness of action on the part of a commission is not ground for judicial interference with its action, when such action does not appear to be arbitrary except in the sense in which many honest and sensible judgments are so. "They express an intuition of experience which outruns analysis and sum up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The (tax commission) board was created for the purpose of using its judgment and its knowledge. (Citing *Railroad Tax* cases, 92 U. S. 575; *State v. Savage*, 65 Neb. 714, 768, 769; *In re Cruger*, 84 N. Y. 619, 621; *San Jose Gas Co. v. January*, 57 Cal. 614, 616). Within its jurisdiction, except as we have said, in case of fraud or clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end."

Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 598.

If the Commission exercises an honest discretion, however wrong its decision from the standpoint of truth in the abstract, in the eye of the law it is the indisputable right in the matter, subject only to jurisdictional defects.

State v. Houser, 122 Wis. 534, 570.

RETURN FROM THE WHOLE LINE MUST BE CONSIDERED.

Another principle is overlooked by the pleader. It is the return from the whole line, and not from particular portions of the line which governs.

> "The cost of constructing and maintaining a portion of a railway, and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based on particular divisions of the road, but upon the entire system."
> *Portland Ry. L. & P. Co. v. Railroad Commission of Oregon*, 56 Or. 468, 482.

The fact that one branch or part of a railroad system fails to pay its expenses does not justify the imposition of unjust or unreasonable rates, or undue discrimination.

> *Interstate Commerce Comm. v. Louisville & N. R. Co.*, 118 Fed. 613, syll. 3.

As was said by the Interstate Commerce Commission in the case of *Traffic Bureau of Merchants Exchange v. S. P. Co.*, 19 I. C. C. Rep., at page 261:

> "We do not recognize the right of a carrier to single out a piece of expensive road and make the local traffic thereon bear an undue portion of the expense of its mantenance or of its construction. A road is built and operated as a whole," etc.

And again:

> "If the position of the defendant were followed by the carriers generally (which it is not, not even by itself), it would result in rates that would vary from mile to mile as the cost of the road varies."

The correct test is the effect of the rates upon the entire line, and not upon constituent parts. The company cannot claim the right to earn a net profit from every mile, section, or other part into which the road may be divided, nor attack as unjust a regulation which fixed a rate which at some such part would be unremunerative. It would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated. Indeed, no railroad pretends to or could make rates on such a basis and no such allegation appears in the bill. To the extent that the question of injustice is to be determined by the effects of the order upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act or order within the state.

> *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 665, 666.

The briefest inspection of the rates formerly in effect as set out in the complaint, show that the complainants gradually advanced their rates with the distance, the *highest rates, relatively, not being* as suggested by them *in difficult and expensive sections but in the least difficult and expensive portion.*

EFFECT OF FINDINGS OF COMMISSION AS TO DISCRIMINATION.

Does the allegation under discussion tender any issue? Will a court in such a case set up its judgment as to what constitutes a fair relationship of rates as against a commission specially created to pass on such questions? The Oregon Commission, in the exercise of its own jurisdiction, is the same kind of tribunal whose findings in *Ill. C. R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, the Supreme Court said were "the judgments of a tribunal appointed by law and informed by experience." Will a court say a scale adopted officially and in general use throughout an entire section is arbitrary, capricious, and unlawful?

This court has spoken in no uncertain tone as to the effect of the findings of the Interstate Commerce Commission on discrimination, and the powers of that commission over interstate commerce are no greater than are those of the state commission over intrastate commerce.

Findings of fact made by the Interstate Commerce Commission as to preferences and discriminations in railway rates are beyond the competency of the courts to re-examine.

Interstate Com. Comm. v. Delaware L. & W. R. Co., 220 U. S. 235.
B. & O. R. Co. v. United States, 215 U. S. 481.

OBJECT OF SUIT.

It is manifest from the bill of appellants, its meagerness of fact, the general character of its

allegations as to the unreasonableness of the order, that the effect on the revenue of the appellants is not the moving cause of this suit. Its real purpose is:

First. To eliminate the power of the state directly or through an administrative body to fix rates or control or regulate railroads within the state.

Second. To make the state Railroad Commission a "useless piece of machinery," to eliminate its power to enforce any order it may make, so that its actions would be merely advisory, and to permit the carrier as a matter of right, to have a court pass upon the mere reasonableness of rates before the order becomes effective. This would make the courts, instead of the commission, the administrative body to carry into effect the legislative will. This is neither legally possible nor economically practicable.

It is now well settled on principle and authority:

1. Congress has power to regulate and control interstate commerce and as to that commerce its authority is supreme.

2. The state has power to regulate and control intrastate commerce and as to that its authority is supreme.

3. The interference by the state with interstate commerce to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of the state.

4. When the carrier uses a local intrastate rate as a factor in making a through interstate rate it does so knowing that all such local rates are under

the control of the state and subject to its regulation. The fact that a reduction of local rates by the state may incidentally place the company under the business necessity of changing its manner of stating its rates or of reducing its interstate rates does not affect the legality of such reduction.

5. Congress has no control over the state commerce which the order seeks to regulate. If the state cannot control it we have a condition whereby a very large portion of the commerce of the United States will be under no control and beyond restraint and the states deprived of a power inherent in every sovereignty.

6. A judicial inquiry is limited to ascertaining whether or not a rate is confiscatory, not whether it is reasonable in the ordinary meaning of the word.

7. Confiscation cannot be predicated of a particular rate or group of rates. It must be shown that the entire body of rates within a state are so unjustly low as to deprive the carrier of reward, and amount to taking of the property.

8. If rates are so unreasonably low as to amount to confiscation the court may enjoin the operation of the order fixing such rates. The burden is upon the carrier to make this appear clearly and beyond doubt.

9. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway

than the services rendered by it are reasonably worth.

10. The public interest is paramount and a carrier is not entitled to any given per cent on its investment, nor to any profit, if in order to secure them excessive or unjustly discriminatory rates are necessary.

11. The ascertainment of what particular rates under all the circumstances are just and reasonable and non-discriminatory as between the carrier, the shipper and the public is a legislative, not a judicial, function.

12. Where a rate is attacked, general allegations of unreasonableness or confiscation state no cause of suit. Facts must be alleged from which the court can arrive at an independent conclusion.

13. The order affects and is intended to affect intrastate rates only. What is state commerce has been clearly defined by this court. Any other class of traffic cannot be affected. This court will not indulge in the presumption that the state of Oregon will interfere or attempt to interfere with interstate commerce. The only difficulty even under appellants' contention arises from its own conduct.

14. The interference alleged is the result of the voluntary use of local rates as such in arriving at the total of through rates. This could be easily remedied without an appeal to the chancellor, without injunctions or appeals to courts at all.

15. The order must be supported if weight is to

be given the uncontroverted findings of the Commission as to unjust discrimination.

Conscious of the great principles involved and solicitous of the welfare of the commonwealth, we have been led to a discussion of the law and the facts perhaps unduly prolonged. The question is momentous. It involves the overturning of an unbroken line of authorities extending from *Gibbons v. Ogden* to *Howard v. Illinois Central*. Is "that commerce which is completely internal, which is carried on between man and man in a state or between different parts of the same state, and which does not extend to or affect other states," to be taken out of the sovereign control of that state and be left subject to no control? Is there to be an attempt to "extend the power of Congress to every conceivable subject, however inherently local," and to "obliterate all the limitations of power imposed by the Constitution, and destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures?" The attack on state control of its own business has been persistent and insidious; it does not result from a patriotic desire to strengthen the hands of the central government nor from motives of economic altruism. The bald fact is, that what is hoped for in these cases is the nullification of all regulation over traffic which is purely intrastate.

The case at bar is a striking example of the extremes to which the doctrine would necessarily be carried.

Before so revolutionary a step is taken, all—court, counsel and parties—may well recall the principles which have so far guided the nation and the states in their dual relations, and contemplate the consequences of the doctrine invoked.

CONCLUSION.

On behalf of the state we unhesitatingly say that, did we not feel the bill of complaint states no facts constituting a cause of suit and that the issues properly presented are of law only, we would have answered the bill as it stands and without delay. The state has nothing to gain by any course except that of entire fairness and frankness. The Railroad Commission of Oregon has no desire to misuse its great powers or to treat unfairly in any respect any citizen, individual or corporate.

After due investigation and hearing it announced its conclusions, and the bill of complaint states no facts in our opinion which would justify the court in setting aside the order complained of.

It is respectfully submitted the judgment and decree of the court below should be affirmed.

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TABLE OF CASES CITED

INDEX

PAGE

ARGUMENT: